In the

United States Circuit Court of Appeals

For the Ninth Crcuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

Upon Appeal and Cross-Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Brief of Appellee and Cross-Appellant

HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
FRANK M. PRESTON,
CHARLES HOROWITZ,
Attorneys for Appellee and Cross-Appellant.

Northern Life Tower,
Seattle, Washington.

Merchants Printing Co., Seattle

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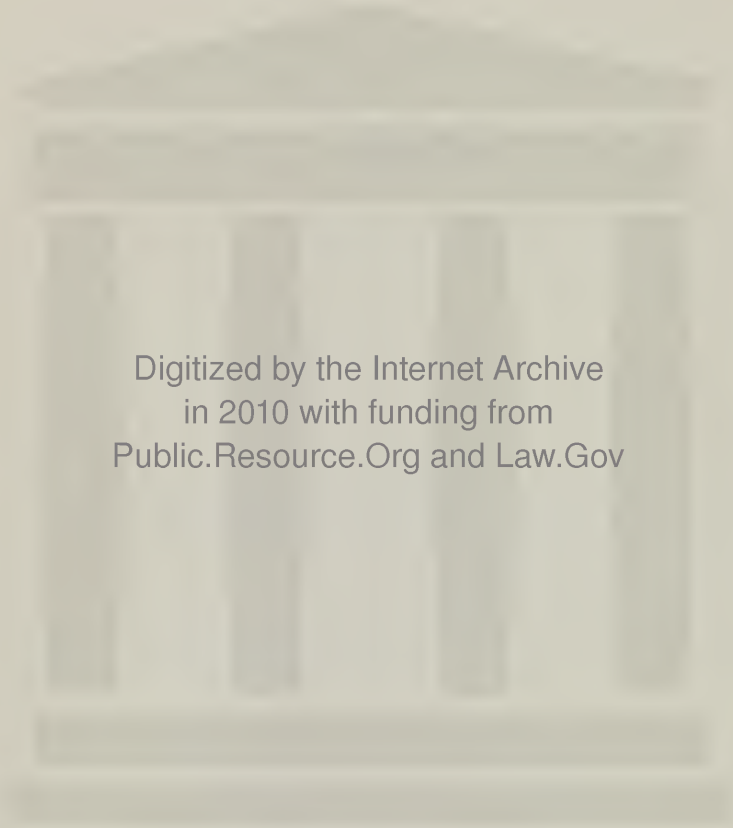

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ADDITIONAL STATEMENT OF THE CASE

Appellant's voluminous brief seeks to have this court reverse the judgment below, to direct either dismissal or a new trial. Points 1, 8, 9 and 10 are principally directed to arguments seeking a dismissal

and points 2 to 7 inclusive are principally directed to obtaining a new trial.

Appellant, for purposes of convenience, has grouped its various specifications of error under ten principal headings. While this method has some advantages, the determination of this appeal will ultimately involve the question whether any of the assignments or specifications of error are well taken. In view of the fact that appellant in its brief, pages IV to VII, inclusive, has set opposite each assignment of error the page of the transcript where error and exception is shown, and the page of the brief where the error is considered, we shall examine each of the errors claimed, using that index for the purpose of ascertaining appellant's contentions and answering the same. (All contentions not argued under a specific assignment of error must be deemed waived.) While this may involve some duplication of argument, effort will be made to reduce this duplicaton to a minimum. It is felt necessary, however, in order that a clear presentation of the errors claimed and the answers thereto may be made. Where assignments can be properly grouped, that will be done.

The following general observations may be made concerning the appellant's brief before considering matters of detail:

(1) It seeks to enforce an interpretation of *joint* tariff 51 not followed by other carriers.

(2) It fails to present all important testimony on the subjects of argument.

(3) In argument it fails to attach any weight whatsoever to the legal principles decided in the case of *Northern Pacific Railway Company v. Sauk River Lumber Company,* 160 Wash. 691, 295 Pac. 926, despite the fact that those principles are of highest importance in this case.

(4) Finally, it fails in nearly all instances, as will be pointed out, to cite cases in point on propositions discussed, as distinguished from excerpts which appear to be superficial authority for the propositions urged. Particularly does it fall in error in treating the law applicable to this case as if what was involved was a reparation order under Interstate Commerce Commission Act.

The sole question, about which many subsidiary questions raised by appellant are grouped, is: Does the term "board measure" as applied to logs, mean board measure determined by the Commercial Scale or by the Northern Pacific Scale under Tariff 51? The jury found that it meant the former. In reaching this verdict, the jury had a right to believe, and undoubtedly did believe, the following matters:

1. That even the Northern Pacific's own scaling method resulted in the carrying of parts of logs "free of charge," e. g. bark, burns, rotten sap, half the hollows (Tr. 117) and breaks (Tr. 240). In addition there was a certain amount of wood which even the application of the railroad's Scribner Decimal C Scale would not measure. Thus, since the rule required the measurement of the diameter of the log at the small end, wood contained in the log as the result of taper would not be measured and no freight paid therefor. Hence, the sawcut at the mill would overrun the Scribner Scale. (See Tr. 112). Hence, we have an illustration of a scale rule voluntarily applied by the railroad in which rates are calculated on the basis not measured by the amount of material transported. It is to be assumed that in fixing the rates, account was taken of that fact. Payment would in reality be made for all the material shipped, even though in form payment would only appear to be made for the material measured.

(Compare statements in Appellant's Brief, pages 4, 9, 11.)

2. The Commercial Scale was in use between buyer and seller of logs in the various logging districts, namely, Grays Harbor, Puget Sound, Columbia River and British Columbia (Tr. 117), and the same kind

of deductions for the same kind of defects are made (Tr. 117). While the formula for computing the gross content of the logs used in the Grays Harbor district is the so-called "Spalding Rule," as distinguished from the Scribner Decimal C Rule, the rules applied result in almost the same gross scale (Tr. 239). (Here the carrier and shipper use the Scribner C Scale).

Furthermore, the Commercial method of scaling is used in sales of stumpage and logs of all kinds and is used by the United States Government in the scale of its timber (Tr. 236). As has been true for many many years a cull is rejected under the Commercial scale. The definition of a cull has been the same throughout this time (Tr. 235, 239). Furthermore the Commercial Scale is used in computing freight charges by the Chicago, Milwaukee & St. Paul Railway and the Great Northern Railway (Tr. 250, 261, 264, 265).

In this connection it should be pointed out that the Commercial Scale figures used by the shipper in this case is merely a resort to the only proof available to the shipper of what the overcharges were. It is not contended by appellee that the Northern Pacific must use the Puget Sound Log Scaling Bureau to scale logs shipped, as might be inferred from the

manner of appellant's argument (App. Br. 8). The jury's verdict in favor of the shipper for the full amount claimed indicates its belief that the amount of over-scale claimed by shipper is correct, and that is of course binding on the parties.

(Compare statements appellant's brief 8, 9, 12.)

3. The compromise agreement of September 24, 1925, known as the Long-Woodworth agreement (Tr. 180), relied on by appellant to create an estoppel against shipper's claim for refund, made no reference to the scaling practice whatsoever (Tr. 200). Indeed, at the time of the agreement, Mr. Long, representing the loggers, was employed by the Weyerhaeuser Timber Company, one of whose subsidiaries (Cherry Valley Logging Company) was shipping over the Chicago, Milwaukee & St. Paul Railway (Tr. 279). The Milwaukee at that time was undoubtedly using the Commercial Scale in assessing freight charges on log shipments, as was a justifiable inference from the evidence (Tr. 250, 261, 264, 265). He must have assumed, in view of the fact that nothing was said about scaling practices, that the Commercial Scale practice, with which he was familiar, would continue to be used and be the basis of refunds. Indeed Mr. Long testified that he did not even know of the scale used by the Northern Pacific (Tr. 200).

While it is true that the refunds were made upon the basis of scales made by the carriers, there is nothing in the record from which it can be claimed that the shippers, including the appellee, believed or thought that any other than the Commercial Scale would be used.

Indeed, Mr. Irving, who was an active member of the logging and railroad conference, out of which the aforesaid agreement emerged, testified that he never knew of the so-called Northern Pacific Scale until the hearing before the Department of Public Works:

He testified (Tr. 280):

> "I first heard of the Northern Pacific scaling method in this hearing. I have been logging forty years in the State of Washington. I have shipped over all the railroads in the state, except the O.W. I shipped over the predecessor of the Northern Pacific, the Seattle Lake-Shore & Eastern, and the Seattle International, also the Monte Cristo."

He further testified(Tr. 283):

> "I didn't have any trouble on the Milwaukee and Great Northern about scaling."

With reference to the Northern Pacific scaling practice, he testified (Tr. 283):

> "I assumed you (referring to the Northern Pacific) were using the proper scale."

Indeed, with reference to the Long-Woodworth agreement, Mr. Irving also testified (Tr. 279):

> "I attended the conference that led up to the Long-Woodworth agreement. I never authorized anyone to agree to a rate which would call for any other scale than the Commercial Scale. The Long-Woodworth agreement would have been unacceptable to me if any other scaling method than the Commercial Scale was to be used in connection with rates."

Mr. Jamison, President of appellee, testified that he began to get suspicous about the scale used by the Northern Pacific and employed Mr. Fishbeck, as joint scaler on the Northern Pacific to scale and determine what was wrong in the excessive scales that he began to notice (Tr. 277).

It is true that freight bills (not showing scaling method despite appellant's inference to the contrary, App. Br. 155) were paid without complaint, not only because the shipper had to pay them first and then complain afterwards (Tr. 161), but also because the officials of the appellee did not know of the Northern Pacific's practice (See Br. 6, 88).

> (Compare appellant's brief 5, 6, 7, 25, 26 and 27.)

4. Appellant states that it used the same form of tariffs since 1906 (App. Br. 20).

The following additional facts should be noted with reference to that statement.

(1) Preceding tariffs were, except for tariffs 29 (which was immediately suspended) and 51, single and not joint tariffs (Tr. 202,3). In view of the fact that the scaling practices of other railroads, parties to the joint tariffs, differed from that of the Northern Pacific, there was an obligation on the part of the Northern Pacific to set forth in the Joint Tariff filed the scaling practice it would insist upon.

(2) Tariff 29 (which was immediately suspended) and 51, unlike the previous tariffs, used the term "board measure" for the first time (Tr. 210, 274).

(3) In 1922 the Department of Public Works published a Tariff Circular (Tr. 272), prescribing rules and regulations concerning the construction and filing of tariffs by common carriers. Among other things the circular provided:

> "Freight and express tariffs in book or pamphlet form must contain in the order named:
>
> "(g) Such explanatory statements in clear and explicit terms regarding the rates and rules contained in the Tariff as may be necessary to remove all doubt as to their proper application.
>
> "(i) An explicit statement of the rates in cents or in dollars and cents per pound, per one hundred pounds, per barrel or other package, per ton

> or per car, or other unit, together with the names or destinations of the places from and to which they apply, all arranged in a simple and systematic manner. Minimum carload weights or other units must be specifically stated. Tariffs containing rates per ton must specify what constitutes a ton thereunder. A ton of 2,000 pounds must be specified as 'net ton' or 'ton of 2,000 pounds'. A ton of 2,240 pounds must be specified as 'gross ton' or 'long ton' or a 'ton of 2,240 pounds'. A ton measurement must be specified as 'ton of 40 cubic feet.' Complicated or ambiguous terms must be avoided."

This circular, therefore, placed the duty upon carriers filing Tariff 51 to set forth a uniform meaning of "board measure," in view of the latent ambiguity of the term and the meaning that that term had in the logging industry. It is therefore hardly correct to state that Tariff 51 was identical with all preceding tariffs without considering the other facts above mentioned.

(Compare App. Br. 5).

The trial court and jury had a right to believe that the proper scale to be used by the Northern Pacific in assessing log freight, was the Commercial Scale, in view of the foregoing summaries of fact.

At the outset we believe it to be important, as well as helpful, to obtain what is a bird's eye picture of this case through the eyes of the Supreme Court of

the State of Washington in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691. The opinion of that court is as follows:

Main, J.—This is an appeal from a judgment of the superior court setting aside an order of the department of public works.

The facts essential to be stated are these: The Sauk River Lumber Company is a corporation, engaged in the the logging business, and will be referred to herein as the logging company. The Puget Sound Scaling and Grading Bureau is engaged in the business of scaling logs for its members and others, and will be referred to as the scaling bureau. During the year 1926, the logging company was logging near the town of Darrington in Snohomish county. One of the Northern Pacific Railway Company's lines extends from Darrington to the city of Everett. After the logs were cut, they were placed upon cars furnished by the railroad company, and transported to Everett. When they reached the yard in Everett, they were scaled by the railroad company's scalers, after which they were dumped into the boom, where they were scaled by the scaling bureau.

The shipment of the logs moved under what is referred to as tariff No. 51, which was filed with the

department of public works by the Chicago, Milwaukee & St. Paul Railway Company, the Great Northern Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Northern Pacific Railway Company, and which became effective October 1, 1925. This tariff provides for "rates in cents per thousand feet," and the rate therein stated from Darrington to Everett is $2.50 per thousand feet. There is a provision in the tariff that the minimum load is "six thousand feet board measure for each car used". The tariff in no place defines what is meant by "board measure".

During the year 1926, the logging company shipped logs, for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the department of public works for a refund. Upon the hearing, the department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63.

The difference arises by reason of the different methods of scaling. The scaling bureau used what is called the Scribner Decimal C Rule, with proper deductions. The railroad company's scalers used Scribner's Decimal C Rule, with deductions in accordance

with rules and regulations adopted by that company many years ago. The rules and regulations of the railroad company never became a part of tariff No. 51, and were not communicated to the logging company. The scaling bureau scaled from eighty to eighty-five per cent of the logs sold in Puget Sound waters during the year 1926, or approximately 1,800,000,000 feet. The scaling bureau's method is the one by which logs are bought and sold generally in the Puget Sound territory. The difference between the two methods of scaling is in the deductions, the railroad company's method allowing less deductions than that of the scaling bureau.

The tariff under which the logs moved not defining board measure, when the matter was presented it became primarily a question for the department of public works to determine. If the tariff, as filed, is doubtful or ambiguous, any doubt should be resolved against the party causing such tariff to be put into effect. In *North Packing & Provision Co. v. Director General,* 104 I. C. C. 607, it is said:

> "The failure of defendants to publish their rates and charges in clear and unmistakable terms, as required by the tariff rules, may not be used as a cloak to defeat the claims of shippers. In construing doubtful and ambiguous tariffs, the Commission has always resolved the doubt

> against the party responsible for having such tariffs in effect."

In interpreting a tariff, the terms used, when they are not defined therein, should be taken in the sense in which they are generally understood and accepted commercially. In *Armstrong Manufacturing Co. v. Aberdeen and Rockfish Railroad Co.,* 96 I. C. C. 595, it is said:

> "While doubts as to the meaning of a tariff must be resolved in favor of the shipper and against the carrier which compiled it, the doubt must be a reasonable one. In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers can be permitted to urge for their own purposes a strained and unnatural construction."

Since tariff No. 51 does not define what is meant by board measure, and since the method of scaling adopted by the scaling bureau is the one recognized commercially, it cannot be said that the department acted arbitrarily or capriciously in the construction which it placed upon the tariff. It is said that this construction will result in discrimination, but we think just the opposite is the effect. The department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs. If it had adopted the railroad's method of scaling, that likewise

would have become effective as to all shipments moving in this state. Inferentially, it appears that the other railroad companies which were parties to the tariff have carried logs for charges which were based upon the scale of the scaling bureau.

It is further said that the scaling bureaus method does not permit recovery for the entire mercantile content of the logs. No method of scaling can be mathematically correct and determine by the scale the exact amount of lumber that may be cut from a log. The fact that sellers and purchasers are willing to adopt the scale of the scaling bureau is a recognition that that scale is as nearly correct as can be made. Of course, it would be impractical to base a freight rate, and collect therefor, upon the basis of the actual cut at the mill from the logs.

It is also said that the scale of the bureau does not include logs broken in dumping ,or logs which have been stolen, but there is no evidence in this case from which it can be found that any substantial quantity of the logs were broken in dumping, or that any of them had been stolen.

Upon the trial before the department, the railroad company sought to introduce evidence which would tend to show that the amount of lumber cut from logs

would be greater than the scaling bureau's scale would indicate, and also that the method adopted by the bureau had a direct bearing upon the revenue of the railroad company, but this was rejected. It must be remembered that this is a proceeding to recover for an overcharge, and not a rate making proceeding. So far as this case is concerned, it must be determined by tariff No. 51, and the proper construction to put on what is meant by "board measure," because that is the basis upon which the freight charge must be made. In this proceeding, the department did not err in rejecting the evidence offered, of which ruling complaint is made.

This case is entirely different from that of *State ex rel. Washington Mill Co. v. Great Northern R. Co.*, 43 Wash. 658, 86 Pac. 1056, 117 Am. St. 1084, 6 L. R. A. (N. S.) 908, where an act of the legislature arbitrarily fixed the weight of standards for lumber cars at one thousand pounds and required such weight to be deducted from the net weight of the lumber on all carloads received for shipment, regardless of the actual weight of such standards.

The briefs in this case have taken a somewhat wider range that this opinion would seem to indicate, but we have considered and determined what appears

to us to be the controlling question, that is, whether the department adopted a wrong method for determining the amount of board feet in logs shipped. It would serve no useful purpose to give consideration to questions which are not necessarily here involved.

As to the amount of recovery, this is based upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate.

The judgment appealed from will be reversed and the cause remanded, with direction to the superior court to enter a judgment sustaining the order of the department of public works.

Tolman, C. J., Mitchell, Beals, Millard, and Beeler, J. J. concur.

Holcomb and Parker, J. J. dissent.

In rendering the foregoing opinion the court was acting in a judicial capacity to determine the reasonableness and lawfulness of the Findings and Order of the Department (Br. 60-68). It stated the law of the State of Washington by means of which to test the Findings and Order. This was not to make the decision res judicata of the issues involved (*C. M. St. P. & P. R. Co. v. Campbell River Mills* 53 F (2) 69) nor to make the decision the "law of the case" in the technical sense (*Steinman v. Clinchfield Coal Corp.,*

93 S. E. (Va.) 684 distinguishing res judicata and law of the case). It did, however, state what the law of the State of Washington was as to how to construe ambiguous terms in a rate tariff on principles of stare decisis. (*People v. Cassiday,* 117 Pac. (Colo.) 357)—and that law was binding (as well as persuasive) on the federal courts (25 C. J. 832).

BRIEF OF ANSWERING ARGUMENT

While in the interests of adequate presentation, each assignment of error has been separately considered, for the convenience of all concerned the following is a summary of the arguments used under the various assignments of error in answer to the appellant's arguments. Appropriate citation to the pages in the brief where the matter is principally discussed is made. Page references have not been given in those instances where an assignment of error is discussed on the basis of an argument previously made in detail in connection with another assignment. Page references to the detailed discussion are nevertheless made.

ANSWER TO POINT 1. Pages

Appellants argument that the appellee is not entitled to recover under the undisputed evidence is argued under eight heads:

A. Tariff 51 is not ambiguous. We contend it is ambiguous:
   (1) Under the law of Washington; 78
   (2) Because the term Board Measure in tariff 51 is a trade term subject to interpretation. 78, 80

B. If tariff 51 is ambiguous, undisputed evidence shows commercial scale interpretation to be unreasonable in failing to give effect to all the terms of the tariff. We contend otherwise, because:
   (1) The law of Washington furnishes the only proper interpretation as that of the commercial sense of the term; 17, 60-68, 78, 175
   (2) The interpretation in the commercial sense is reasonable and gives effect to all terms of the tariff. 83

C. Undisputed evidence of practical construction by the parties of the Northern Pacific scale is conclusive. We contend otherwise, because:
   (1) The law of Washington conclusively determines that the term Board Measure means Board Measure in the commercial sense; 88
   (2) The evidence shows no such practical construction; 88
      (a) Nor a construction knowingly acquiesced in by shipper. 88, 89
   (3) The Northern Pacific construction of the term results in discrimination; 90, 98

(4) The alleged practical construction is not conclusive. It is only one aid to construction, if applicable. 90

D. The commercial interpretation makes tariff 51 illegal in that it permits confiscation, discrimination, and free carriage. We contend otherwise, because:

(1) The law of Washington conclusively determines the method of ascertaining the meaning of board measure, and makes appellant's objection unavailable in this proceeding; 91, 92

(2) The sufficiency of rates is irrelevant in this reparation proceeding: 91, 92

(a) Carrier takes the risk of interpretation on a voluntarily filed tariff. 93

(3) Such evidence is inadmissible unless coupled with an offer to show the same is true as to other party carriers to tariff 51; 91, 99

(4) The evidence does not show discrimination; 97

(5) It is conclusively presumed that there is no free carriage in fact. 87, 95

E. The shipper has waived or is estopped to obtain reparation. We contend otherwise as to both estoppels argued, because:

(1) Estoppel based on failure to call the carrier's attention to the fact that it was using the wrong scale:

ANSWER TO POINT 2.

C. Rules for the interpretation of tariff 51:

(1) The only proper instruction was that in accordance with the law of Washington construing an ambiguous term in its commercial sense. 187-191

D. Miscelllaneous:

(1) Court's instructions contradictory. 176

We contend otherwise;

(2) Instruction on free carriage improper. We contend that it was proper. 179, 180

(3) Instructions on protest and rule of tolerance improper. We contend they were proper:

(a) Because there is no evidence to warrant appellant's proposed instructions; 195

(b) The instructions given were more favorable to appellant than it was entitled to receive. 195, 197

ANSWER TO POINT 5.

Appellant contends striking all pleading and evidence as to estoppel and counter-claim was improper. We contend:

A. The court properly struck the counter-claim, because there was no evidence:

(1) Warranting rescission of Long-Woodworth agreement; 133

(2) Warranting a finding of breach

ANSWER TO POINT 6.

ANSWER TO POINT 7.

ANSWER TO POINT 8.

Appellant contends the court erred in refusing to dismiss plaintiff's case because the Department's order is not final. We contend:

A. The motion to dismiss does not raise this contention. 28

B. The order is final because the Department found the amount of overcharge and directed its payment. 28, 29

C. The findings support the order. 29, 37

ANSWER TO POINT 9.

Appellant contends the order is void because entered by the Department pecuniarily interested. We contend it is valid, because:

A. The claimed invalidating statute is inapplicable; 38, 39

B. The Department's pecuniary interest is indirect and remote and therefore permissible; 38, 41

C. The invalidating interest claimed to exist is ineffectual to render the order void because judicial review and a subsequent de novo trial is permitted. 38, 47

ANSWER TO POINT 10.

Appellant contends shipper cannot recover because there is a necessary party absent, and a splitting of a cause of action. We contend neither point is valid, because:

A. The objection was not timely urged, and therefore waived; 49

ANSWER TO ASSIGNMENT AND SPECIFICATION OF ERROR No. 1

(Tr. 64, 73, 288, 387; App. Br. 352-372)

Appellant contends the court erred in denying defendant's motion to dismiss for want of jurisdiction based upon the fact that the order of the Department of Public Works on which this suit is brought is not a final order.

It argues, (1) That a final order must be entered by the Department of Public Works before suit can be brought in the Superior Court to enforce it. (App. Br. 359, 361, 367); (2) That the order entered here is not final because: (a) The amount of overcharge has not been *found* (App. Br. 362, 364) or directed to be paid in a specific sum (App. Br. 368), the Department reserving jurisdiction to find the amount if the parties could not agree; (b) The amount found (if the findings and order are construed to constitute a finding and order as to amount) is unsupported by the findings of fact and therefore ineffective (App. Br. 367).

No case cited by appellant in support of this assignment of error is in point.

It is appellee's position that:

(1) The motion for dismissal, which is the subject of this assignment of error, does not raise the question argued.

(2) The Department *found* the amount of overcharge and directed appellant to pay it, so that the order is "final."

(3) That the findings support the order. Hence the order is a final order enabling the shipper to bring suit thereon.

We shall discuss these points in the order named.

(1) The motion for dismissal is based expressly on want of jurisdiction, but the fact that the court had jurisdiction of the parties and the subject matter, i. e. recovery of the overcharge, seems clear. The railroad appeared generally, not specially. (Tr. 22). The question that it raised could only be raised by demurrer (R. R. S. 259), in accordance with state practice in a law case. (28 U. S. C. A. 724). This motion confuses jurisdiction with the sufficiency of facts alleged to constitute a cause of action.

An oral demurrer was later interposed by defendant but upon different grounds (Tr. 74) and the action of

the trial court in overruling that demurrer will be considered later.

(2) Assuming, however, that the motion to dismiss be treated as a demurrer, it is still not well taken. An examination of the findings and order makes it clear that the amount of reparation was found by the Department. Paragraphs (9) and (10) of the findings (Tr. 79 to 81) discuss the methods used by appellee in arriving at the overcharge of $9,282.63. It represents the difference between freight charges paid, a total of $188,784.55, and the freight charges that should have been paid, based on the Commercial Scale, of $179,501.92. That the method used by the shipper in determining the amount of overcharge was accepted by the Department, is indicated by referring to paragraphs (23) to (25) (Tr. 92), which read as follows:

> "(23) We are further of the opinion and find that all shipments of logs herein referred to, made by the complainant between the dates shown, were properly and correctly scaled by the bureau in accordance with the methods described above.
>
> "(24) We are further of the opinion and find that the charges collected were unreasonable to the extent that they exceeded $179,501.92.
>
> "(25) We further find that complainant made the shipments as described at the charges herein found unreasonable, that it paid and bore the

> charges thereon, that it has been damaged thereby in the amount of the differences between the charges paid and those which would have accrued at the charges herein found reasonable; and that it is entitled to reparation and interest."

In making this finding the Department necessarily accepts the shippers method of giving credit to the railway for rates based upon a minimum load of 6000 feet board measure for each car, the computations as to the minimum being clearly set forth in paragraphs (9) and (10). Furthermore, the amount of the freight charges paid were as stated in the findings, (Par. (10), Tr. 80) "computed from the paid freight bills of the railway company offered as Exhibit No. 3 in this proceeding." Exhibit No. 3 is the same as plaintiff's Exhibit 14, 15 and 16, introduced in the trial below. (Tr. 279).

The foregoing facts should dispose of the statements made in appellant's brief (p. 363) as to uncertainty in respect to the amount found by the Department as an overcharge.

Furthermore, the order recites: (Tr. 92)

> "This cause being at issue upon complaint and answer on file and having been duly heard and submitted by the parties and full investigation of the matter and things involved having been had and the Department having on the date hereof made and filed a report containing its *findings of*

fact and conclusions thereof which said report is hereby referred to and made a part hereof.''

Having found that the frieght charges paid were $188,784.55, and made that finding a part of the order, the Department then proceeds to order the Northern Pacific to pay as reparation "all sums in excess of $179,501.92"; it is clearly a mere matter of mathematics to determine that the difference between the amounts $188,784.55 and $179,501.92 is the amount of reparation in the sum of $9,282.63.

The foregoing review of what the Department found is clearly sustained by the view taken by the Supreme Court of Washington on appeal (160 Wash. 691) of that same order. In affirming the Departmental award the Supreme Court describes the proceeding as an appeal to it from the Superior Court's judgment "setting aside an order of the Department of Public Works for reparation of overcharges by a public carrier."

In referring to what the Department found the court said: (P. 693)

> "Upon the hearing, the Department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63."

At page 696 of its opinion the court said:

> "As to the amount of recovery, this is based

upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate."

The court then directed the Superior Court to enter an order sustaining the order of the Department.

In reviewing the order, the Supreme Court acted in a judicial capacity, as will be hereinafter pointed out. In interpreting the order, therefore, the court's interpretation would seem to be conclusive and certainly highly persuasive. See *Arizona Wholesale Grocery Co. v. Southern Pac. Co.*, 68 F. (2) 601 (C. C. A. 9th).

The only matter which throws any doubt upon the conclusion that the order entered was a final order finding the amount of the overcharge, is the paragraph reserving jurisdiction to enter a further order and directing the parties meanwhile to ascertain the amount of reparation due. But for this paragraph there could be no question whatsoever about the soundness of the conclusion above reached. The aforesaid paragraph, if read literally would nullify the first paragraph; would discard and throw overboard all the facts and figures found after weeks of testimony, and leave the parties just where they were before this protracted hearing. Can it be claimed that because of the conflict between the two paragraphs that

the order is ambiguous? Is the order one for the payment of $9,282.63, or is it as appellant contends, no such order at all?

There can be no better guide as to the meaning of the order, than the construction placed upon it by the parties affected thereby. The railroad itself has at all times treated the order as one ordering the payment of reparation in the sum of $9,282.63. Thus, when the plaintiff brought suit to recover the amount of the award, and the defendant petitioned to remove the proceedings to the Federal Court, its petition for removal alleged: (Tr. 9)

> "That this suit is one of a civil nature in equity, of which the District Courts of the United States have original jurisdiction, in that this action is to recover on an interlocutory order made by the Department of Public Works on July 1, 1929, that petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharges. . . . "

Furthermore, in opposing the shipper's motion to remand, the carrier contended that the affirmance of the Departmental award authorized the shipper to commence suit, which was but another way of stating that the award was final so that suit might be commenced. Judge Neterer apparently accepted this contention, because in his memorandum decision denying the motion to remand he stated: (Tr. 16)

> "The motion to remand must be denied. The joint jurisdiction of the Department of Public Works and its findings and order and review by the nisi prius court and the Supreme Court of the state, together a regulatory body is exhausted. The function of the regulatory body was to find the facts upon the evidence presented. This finding the defendant may accept and pay within a given time. Upon failure to pay, a right is given plaintiff by the law to sue defendant for such sum. This is the creation of a new right, an independent cause of action to collect the claim by plenary action and in a tribunal of competent jurisdiction. The plaintiff could elect to sue in the state court and the defendant had the right to remove the action to this forum."

This was clearly recognition of the fact that the order was so far final as to permit a plenary action in a court of competent jurisdiction to recover the amount of the award. The departmental jurisdiction had been exhausted.

Further more, any ambiguity that may have existed as a result of paragraph two of the order, reserving further jurisdiction, must, in view of the decision of the Supreme Court of Washington be deemed to be resolved against the carrier. It stated what the order meant, and that meaning, we submit, is not only highly persuasive, but binding.

At this point we call attention to *State ex rel G. N. Ry. Co. v. Public Service Commission,* 76 Wash. 625.

This case holds that an order is final even though it contains a provision that in case of the failure of railroads to agree upon joint rates the public service Commission would itself by supplemental order establish such rates and fix the division between the respective carriers. The court said:

> "It fully covered and disposed of the matter before the Commission. It required nothing to make it effectual, and, had it been complied with by appellants, would have ended the matter. That it did not end the matter was not because of its lack of finality, but because, appellants, having failed to observe its mandate, subsequent action to enforce it became necessary on the part of the Commission."

The shipper's claim originated in January 1927. The litigation was in the Department for two years; was in the state court for two years more, and at the time of the trial was in the Federal court for four years, a total of over seven and one-half years of litigation. During this entire period the carrier, as well as the shipper, the Supreme Court of Washington, and the trial court in this case, have all treated the order of the Commission as an adjudication of the amount of the overcharge. The defendant is sarcely in a position to ask the court, in good faith, contrary to all its former contentions on this point, to absolutely dismiss this case. The order of the Department,

viewed in any common sense way from any practical angle, is a determination that the overcharge has been made and the amount thereof found.

This court is asked by the carrier to take a strictly literal and technical view of the language of the order and of the problem involved. Its plea to the court now is: "Please do not hold us accountable for what we have overcharged our customers because the Departmental language is somewhat obscure and ambiguous."

The real point at issue has been decided by the Department. To contend now that no order of reparation has been entered, although that order has been recognized during years of litigation, aud although the defendant itself has treated the order as sufficient up to the time of trial, is an unmeritorious argument to the effect that form should govern at the expense of substance and that the whole proceeding should be commenced over again and run through another period of years.

Not a single case cited by the appellant warrants any such holding in this case. Even in the *Campbell River Mills Company* case, so confidently relied upon by appellant (App. Br. 368, 369) the form of the order is not set forth, so that it cannot be determined whether the order entered was a final one or not.

Unquestionably it was not final because the freight or express bills were not filed or produced at the hearing (53 Fed. 2d. 70). In the case at bar the freight bills were introduced at the hearing so that the Department was in a position to determine the amount of freight charges paid, and hence, to enter an order of reparation based upon the difference between the freight charges paid and the freight charges payable. The *Campbell River Mills Company* case is, therefore, clearly not in point.

(3) Appellant also claims that the findings do not support the order, thereby rendering the order ineffective (App. Br. 367). But the Supreme Court of Washington, charged with the responsibility of determining the "reasonableness and lawfulness" of Findings and Order (Br. p. 61) upheld them, ordering (p. 696):

> "The judgment appealed from will be reversed and the cause remanded, with direction to the Superior Court to enter a judgment sustaining the order of the Department of Public Works."

Had the findings been insufficient to sustain that order the court would have been compelled, under the authorities cited by the appellant (App. Br. 365, 367), to have affirmed the action of the Superior Court in setting the order aside. See also *People's*

Fruit & Veg. S. Ass'n v. Ill. Com. Com'n, 184 N. E. (Ill.) 615. It is now too late to attack the validity of the order collaterally in the fashion here attempted Any such attempt must be based upon a view that the decision of the Supreme Court of the State of Washington has absolutely no meaning or effect whatsoever.

It is respectfully submitted, therefore, that appellant's assignment of error No. 1 is not well taken.

ANSWER TO NO. 2

(Tr. 73, 288, 387; App. Br. 373-392)

Appellant contends, court erred in denying its motion to dismiss for want of jurisdiction, on the ground that the order of reparation is void under the Fourteenth Amendment to the Federal Constitution in that the Department of Public Works had a pecuniary interest in the award entered.

We contend: (1) the invalidating statute is not applicable;

(2) the Department's interest is indirect and remote;

(3) a *de novo* trial and judicial review being permitted, the contention falls.

(1) The ten per cent statute relied on is not applicable here.

The award was based upon the procedure provided in the laws of 1911, p. 600, Sec. 91 (R.R.S. 10,433) calling for a hearing before the Public Service Commission. The duties of that commission were subsequently taken over by the Department of Public Works under the supervision of the Director of Public Works (Laws 1921, p. 18, Sec. 21; p. 19, Sec. 25; R. R. S. 10779, 10784).

The Department originally consisted of a Supervisor of Transportation, a Supervisor of Public Utilities and a Supervisor of Highways (Laws 1921, p. 18, Sec. 21, R.R.S. 10779). The office of Supervisor of Highways was afterwards abolished (Laws 1923, p. 192, Sec. 3, R.R.S. 10939-3), so that at the date of the hearing of this cause before the Department of Public Works there were the Supervisor of Transportation, the Supervisor of Public Utilities and the Director of the Department. These heard the complaint (Tr. 75). There is no provision in the Laws of 1911 for any fee to which the Public Service Commission shall become entitled.

The provision as to the ten per cent fee applies only to a proceeding under the act passed in 1921

(Laws 1921, p. 336, R.R.S. 10435) and provides a supplementary method of collecting refunds, since the director in his discretion is authorized to render judgment for the amount of overcharge found. For refunds collected by the Department "under this act" a ten per cent fee may be charged for that purpose (Laws 1921, pp. 336, 337, Secs. 2 and 3, R.R.S. 10435, 10436). The ten per cent is collected only if the refunds are collected; not merely if the award is made. Obviously, if the claimant itself collects the award by resorting to suit, as provided in the procedure of the Laws of 1911, p. 600, Sec. 91, R.R.S. 10433, the ten per cent provision is not applicable.

While it is true that the Departmental order in this case directs payment by the Northern Pacific to the Department of Public Works under the 1921 Act, payment to the beneficial plaintiff, namely The Sauk River Lumber Company, would be a defense to a subsequent claim by the Department, and because the Department had not collected the refund would not involve the application of the ten per cent provision (Br. p. 38).

Our first point is, therefore, that the appellant's argument must fail because it is based on a provision of an inapplicable statute.

(2) Assuming that the ten per cent statute (R.R.S. 10436) is held to apply, there is nevertheless no denial of due process. It will be noted that the ten per cent fee is to be paid into the Public Service Revolving Fund of the State Treasury by the terms of the statute itself. This fund is a General Fund, available for all general fund purposes (R.R.S. 5509). Neither the salary of the director nor the administrative expenses of the Department of Public Works is dependent upon the outcome of a reparation case. That salary and those administrative expenses are paid, irrespective of the outcome, and is provided for by other general statutes of the state (R.R.S. 10776, 10896). Such salaries and such administrative expenses come from the General Fund, irrespective of the origin of the money paid into such fund (R.R.S. 5510).

While it is true, as appellant has pointed out (App. Br. 386), that the legislature has appropriated to the Department of Public Works certain sums from the Public Service Revolving Fund, it should also be pointed out that the same appropriation statutes on the same pages cited also made substantial appropriations from other General Funds to that Department. It is reasonable to assume, in view of the fact that the General Fund appropriations have

been in varying amounts, that any administrative needs of the Department of Public Works would be met by sufficient appropriations from other General Funds, so that the Department could have no direct interest in the outcome of any reparation case.

Furthermore, it is to be remembered that there is nothing in the statutes of the State of Washington that compels the legislature to appropriate the funds from the Public Service Revolving Fund to the Department. It can be used like any other General Fund in the payment of any state obligation. Any interest that the Department would have in ordering reparation would therefore be indirect and remote.

In view of the foregoing statement of the indirect and remote interest of the Department in the outcome of a reparation case, it can readily be seen that the cases cited by appellant are clearly distinguishable and not in point.

In the case of *Tumey v. Ohio,* 273 U. S. 510, 71 L. Ed. 749, 47 Sup. Ct. Rep. 437 (App. Br. 376), it appeared that the compensation of the Mayor was directly dependent upon the fees received from convictions, quite unlike the case at bar. Likewise the statute under which convictions were had was such that a fair trial was wholly improbable. It was

on this phase of the matter that the court refers to the official as distinguished from the private interest of the Mayor in securing convictions. The court described this situation as follows (p. 444):

> "The statutes were drawn to stimulate small municipalities, in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial, and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias, or willful disregard of duty by the trial court. It specifically authorizes the village to employ detectives, deputy marshals, and other assistants to detect crime of this kind all over the county, and to bring offenders before the mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful

> conduct of such a court. The mayor represents the village and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all; and, second, having found his guilt, to measure his punishment between $100 as a minimum and $1000 as a maximum for first offenses, and $300 as a minimum and $2000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?''

Likewise the case of *In Re Volland,* 69 Fed. 2d. 475 (App. Br. 381), was one in which the special master before whom the case was tried had a direct pecuniary interest in deciding the case for one of the litigant parties, namely, the trustee in bankruptcy. By deciding the case in his favor the assets of the bankruptcy estate would be increased and the fees payable to the referee in bankruptcy would be enhanced. Since the special master was the referee in bankruptcy also, it is obvious that his direct pecuniary interest in the outcome of the case would disqualify him.

Again the District Court case of *Texas Electric Service Co. v. City of Seymour,* 54 Fed. 2d. 97 (App. Br. 384), was one in which the City Council was held

disqualified from raising the rates of a private utility to a point of parity with that of its competing municipal utility. The interest of the City Council in thus fixing the rate of a competitor in a town of 2626 people is so obvious that a fair rate making proceeding was wholly improbable.

That the distinctions hereinabove made are supported in the cases will appear from cases subsequent to and explaining the Tumey case.

In *Dugan v. State of Ohio,* 277 U. S. 61, 48 Sup. Ct. 439, the court held that a defendant convicted before the Mayor's court was not denied due process because half of the fines were paid into the City Treasury and the Mayor as a member of the City Commission had a right to vote on appropriations and the spending of city funds, even though the fines contributed to the general fund out of which the Mayor's salary was payable. *The Mayor received a salary and no fees and his salary was not dependent on whether he convicted in any case or not.*

The court said (p. 440):

> "No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general

> fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or effect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the Tumey case do not cover this."

In *Bevan v. Krieger,* 289 U. S. 459, 53 Sup. Ct. 661, the court held that the notary's right to fees for taking depositions and for taking testimony stenographically and furnishing additional copies thereof, is not such pecuniary interest as rendered his commitment of witnesses for contempt for refusal to answer questions violative of due process. In distinguishing the Tumey case the court said:

> "Tumey's interest was direct and obvious, but the possibility that the extent of the Notary's services and the amount of his compensation may be affected by his ruling is too remote and incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the Tumey case, as it is subject to review in accordance with Sec. 11514."

In re Battani, 6 Fed. Supp. 376, held in a proceeding to compel the depositary to surrender bankruptcy funds, the referee was not disqualified because of

alleged increase in fees based on increase in amount payable from depositary. The court distinguished the Tumey case in that "a direct financial benefit would have resulted to the official from his act."

The court also said (p. 378):

> "Such a reason for disqualification would to a large extent prevent referee's functioning in office. In every proceeding involving accumulations to an estate they would be disqualified."

(3) There is still a second ground of distinction between cases such as the Tumey case and cases such as that here involved. Not only is the pecuniary interest indirect and remote in this case, but the findings and award entered are subject to judicial review and then are merely prima facie evidence of the facts found and not of liability. The carrier tries his case *de novo,* when an action is brought in a court of competent jurisdiciton to recover because of the award made. Where a *de novo* trial is permitted defendant, he cannot claim an award, even by an administrative body that has an interest therein, is a denial of due process.

See *Bevan v. Krieger,* 289 U. S. 459, *supra,* in which the court said:

> "Moreover, his action lacks the finality which attached to the judgment in the Tumey case,

as it is subject to review in accordance with Sec. 11514."

See also, *Hill v. State,* 298 S. W. (Ark.) 321, distinguishing the Tumey case from the Hill case in that a *de novo trial* was provided, and *Brooks v. Town of Potomac,* 141 S. E. (Va.) 249, assigning a similar reason, despite the fact that the Mayor, by imposing a fine, received $3.00 and by giving judgment of acquittal only received a fee of $1.50.

Finally it should be pointed out that the Supreme Court of Washington in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, before whom the point now urged by appellant was argued, apparently rejected it is not a controlling point. Had the point been meritorious, the Supreme Court would have been compelled to set aside the Departmental award. See Resp. Brief, Pl. Exh. 19, 20 (Tr. 286).

It is therefore submitted that appellant's assignmentment of error No. 2 is unavailing.

ANSWER TO NO. 3.

(Tr. 74, 289, 388; App. Br. 392.)

The trial court denied appellant's motion for dismissal, overruled its oral demurrer and refused to stay proceedings, which motions and demurrer were

on the ground that there had been a splitting of a single cause of action and the absence of an indispensable party plaintiff.

Appellee's position is:

1. The objection on which error is assigned was not timely made.

2. The order requiring payment of the reparation to the Department of Public Works not having been followed by the entry of judgment, permits the shipper as a real party in interest, to bring suit in a court of competent jurisdiction to recover the amount of reparation awarded. Hence Department isn't necessary party.

3. The recovery by the shipper includes the ten per cent as part of one cause of action if such ten per cent is payable. There is therefore no splitting of a cause of action.

We shall discuss each of the above points in the order named.

1. The point that the Department of Public Works was a necessary party and that a cause of action would be split if the shipper alone were permitted to sue, was raised for the first time on the morning of the trial (Tr. 74). Despite the fact that the

order was set out in full in the complaint so that the objection of absence of necessary party was apparent, the appellant neither demurred for want of a necessary party as permitted by the Washington statute (R. R. S. 259) nor set up this defense in its answer (Tr. 22, 54). It is well settled that the point thus raised by appellant came too late.

Dryden v. Sewell, 2 Alaska, 182.
Flanagan v. Drainage Dist. No. 17, 2 S. W. (2d) (Ark.) 70.
Sifers v. Walch, 195 N. W. (Iowa) 185.
Bignold v. Carr, 24 Wash. 413, 64 Pac. 519.
Baxter v. Scoland, 2 Wash. Terr. 86, 3 Pac. 638.

R. R. S. Sec. 263 provides:

> "If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

The motion to dismiss, the demurrer and motion to stay were not based upon lack of jurisdiction or insufficient facts, but were based solely upon the ground of defect of parties plaintiff and the consequent splitting of a cause of action if plaintiff is permitted to recover. Under the statute the objections were made too late to be available. On the

question of sufficient facts to constitute a cause of action, see argument pp. 28, 51-58, *infra.*

As pointed out in the case of *Dryden v. Sewell,* supra, under the statute providing that every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the act, where the objection is not taken *in limine* by plea, answer or demurrer the court considering the mischief already incurred and the objection being merely technical and formal, will not, except in special cases allow it to prevail at the hearing, but will deem it to have been waived.

While the Washington cases above cited dealt with defects of parties defendant, the rule applies whether the parties be defendant or plaintiff, as indicated in the Flanigan case above cited, which involved a cross-complaint.

This being a law action, the Federal Court will by virtue of the provisions of the conformity act, adopt the state procedure on the above question.

2. Under the 1921 act the Director of the Department of Public Works was permitted but not required to render judgment for the amount of reparation awarded "if he deemed it necessary to insure the prompt payment of the same to him." (R. R. S. 10,

435). In the absence of a finding to that effect the reparation award would not be a judgment within the meaning of the statute.

> *Tacoma Grain Co. v. N. P. Ry. Co.,* 123 Wash. 664, 213 Pac. 22.

Furthermore, it is doubtful if the director could constitutionally enter judgment on his reparation award. In the Tacoma Grain case, supra, the court doubted his power to do so in the following words (p. 668):

> "We will not determine in this matter whether the department of public works, a fact-finding body having administrative powers, has power to enter a judgment which can be enforced under the provisions of the act of 1921, supra. Superficially, it might be suspected that the commission has no such power, notwithstanding the statute referred to; but we will determine that question when it arises in an appropriate manner."

The doubt thus expressed may be based upon two grounds. The first is, that the judicial power to render a judgment cannot be delegated to an administrative board in view of the theory of separation of powers. See 12 C. J. 902, 33 C. J. 1064. Secondly, a judgment entered upon findings and order awarding reparation would in effect render such findings and award conclusive, and not merely prima facie evidence of the facts stated. This would constitute a viola-

tion of the provisions of the state constitution granting trial by jury, and would undoubtedly be void. See

> *New York & Pennsylvania Co. v. New York Central R. Co.,* 110 Atl. 286 (Pa.).
>
> *Western New York, etc. v. Penn. Refining Co.,* 137 Fed. 343 (C. C. A. 3rd).
>
> *Meeker v. Lehigh Valley R. R. Co.,* 236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644.
>
> *State ex rel Chicago, Milwaukee & St. Paul Ry. Co. v. Public Service Com.,* 94 Wash. 274, 286.

If therefore the Department does not or cannot constitutionally enter a judgment upon a reparation award, would a complainant be without remedy to enforce an award merely because the director orders payment to the Department rather than to the complainant? Such a conclusion is by no means compelled by the statutes involved.

Laws 21, p. 337, Sec. 6 provides:

> "Hearings to determine the amount of any refund due under this act shall be held in the same manner, *the same procedure followed, . . .* as is provided for hearings, *procedure,* reviews and appeals in matters before the Public Service Commission of Washington under the provisions of Chapter 117 of the Laws of 1911."

Appellant's argument fails to give effect to the phase, "the same procedure followed" contained in the above act (App. Br. 398, 399). Since the entry

of judgment is not made mandatory by the 1921 Act, is it not reasonable to assume that the legislature did not intend to deprive a complainant of relief by way of suit in accordance with the procedure under the 1911 act if no judgment for overcharge was or could constitutionally be entered? It would require a highly technical interpretation of the meaning of the legislation to contend as does the appellant, to the contrary.

After all, the suit is not on the award as such. The suit is on a cause of action, one constituent fact of which is the entry of findings and order by the Department of Public Works. The fundamental fact is that findings and order have been entered awarding reparation and that the shipper entitled to reparation has been clearly named. Overcharges were exacted by the carrier in the year 1926. It was a condition precedent that the amount thereof be determined by the Department. *Belcher v. Tacoma & Eastern R. Co.,* 99 Wash. 34. That condition precedent has now been satisfied, and technical considerations should not be permitted to deprive the shipper of his right to recover for overcharges thus exacted.

The complainant who has been compelled to pay excessive freight charges is the real party in interest

and the party beneficially interested in the award. R. R. S. Sec. 179 provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as it otherwise provided by law."

The Federal Court, under the Conformity Act, in a law action is bound by this provision.

> *American Surety Company of New York v. Scott,* 63 Fed. (2d) 961 (C. C. A. 10th).
>
> *U. S. v. Skinner & Eddy Corp.,* 5 Fed. (2d) (D. C. Wash.) 708.
>
> *U. S. v. Skinner & Eddy Corp.,* 28 Fed. (2d) D. C. Wash.) 373.
>
> *U. S. v. Skinner & Eddy Corp.,* 35 Fed. (2d) 889 (C. C. A. 9th).

It has been generally held that persons injured by the payment of excessive freight charges are entitled to recover the reparation as the real party in interest, irrespective of the paper title to the reparation. Ann. 13 A. L. R., 289 collects the numerous authorities. It has even been held that the state cannot maintain an action to recover overcharges unlawfully exacted from shippers by common carriers because it is not the real party in interest, the shippers being such real party. See 13 A. L. R., p. 299.

While the Supreme Court of Washington has not specifically passed on this point, it was held that the

party beneficially interested is the real party in interest under the aforesaid statute despite the fact that legal title was in another.

Stotts v. Puget Sound Traction Light & Power Co., 94 Wash. 339, 162 Pac. 519, held that a vendee in possession under a conditional sales contract may maintain an action for injuries to the property as the real party in interest within the meaning of Rem. Code, 179, even if vendee does not have legal title, especially in view of the defendant's right to bring in additional parties.

If the appellant deemed the presence of the Department of Public Works necessary to a determination of this litigation it might under the provisions of R. R. S. 196 have brought the Department in as an additional party in the case. That statute provides:

> "The court may determine any controversy between parties before it when it can be done without prejudice to others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties the court, shall cause them to be brought in."

The Federal Court by virtue of the Conformity Act had the same power and might have granted that relief had it been timely invoked.

Simpkins Federal Practice, Rev. Ed. Sec. 25, p. 27. It seems clear therefore that in the absence of a judgment entered by the director, the shipper as real party in interest had a right to sue for the purpose of recovering the amount of the award.

The absence of the Department as a party plaintiff has not worked any injustice whatsoever to the appellant. The appellant has been permitted to assert every defense that it could have asserted had the Department been a party plaintiff. Since a recovery by the real party in interest is an effectual bar to a recovery by anyone else the appellant can scarcely claim prejudice by reason of the absence of the Department as a party plaintiff. 47 C. J. 34. See also *Blaser v. Fleck,* 189 Pac. (Ore.) 637, p. 638:

> "A question similar to the one in the present case was disposed of in *Sturgis v. Baker,* 43 Or. 236, as page 241, 72 Pac. 744. It was there held that the statute requiring that every action shall be prosecuted in the name of the real party in interest (section 27 L. O. L.) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. See also *Simon v. Trummer,* 57 Or. 153, 159, 110 Pac. 786; *Triphonoff v. Sweeney,* 65 Or. 299, 307, 130 Pac. 979; and *Devlin v. Moore,* 64 Or. 433, 441, 130 Pac. 35."

In this case, the Department is bound by any judgment obtained by the shipper since it is in any event a privy to such judgment. Its rights are wholly derivative. Unless the shipper has a right to the reparation award and collects the same the Department has no interest therein. It being a privy to the judgment, the judgment recovered is binding against it and it cannot thereafter assert the claim recovered by the real party in interest. See 34 C. J. 1009, 1010 and 1011 discussing privies. This is but another way of saying that a recovery by the real party in interest is a bar to recovery on the same cause of action by anyone else. 47 C. J. 34.

3. The Department has of course no independent cause of action for the 10% collection fee. This conclusion follows from what has heretofore been urged, namely, first, because the statute is not applicable to collections effected by the shipper, and secondly, because the fee is included in the award. The cause of action is entire and since recovered by the real party in interest, no splitting of a cause of action is involved. If the 10% is owed it is owed by the shipper to the Department, and not by the carrier to the Department. An analogous case is that of *Harris v. Johnson,* 75 Wash. 291. There the payee of a promissory note was held to be the real party in interest

entitled to sue thereon under the state statute despite the fact that the promissory note was for a sum to be divided between herself and another person not a party to the suit. So in this case the complainant is the real party in interest. The fact (if it be a fact) that the proceeds must be divided with the Department of Public Works does not mean that there is a splitting of a cause of action to permit the real party in interest to recover the whole.

The rule should also be remembered that where sufficient parties are before the trial court to authorize a proper judgment, the fact that others are interested in the subject matter will not call for reversal if no injustice has been done.

Davison v. Rake, 16 Atl. (N. J.) 227; affirmed 18 Atl. (N. J.) 752.

It is submitted that appellant has not been prejudiced in any way whatsoever by the absence of the Department as a party in the case, and that, therefor, this assignment is not well taken.

ANSWER TO NOS. 4 TO 22, INCLUSIVE

(Tr. 75, 94, 102, 388, 407-423; App. Br. 247, 256-293).

Appellant contends that the trial court erred in overruling appellant's objection to introduction in evidence of the findings and order of the Department. (Pl. Ex. 1). The ground of the objection was, (1) that improper matter was inextricably interwoven with proper matter so that it was impossible to cull out the findings to support the order; and (2), alternatively, that the court should have deleted improper matter before admitting the findings.

It is appellant's position:

(1) That the form and sufficiency of the findings and order are no longer an open question in this case, and not subject to what amounts to collateral attack;

(2) The items to which objection are made are not improper;

(3) In any event, the remedy is in the Court's instructions to the jury.

We shall discuss each of these contentions in turn.

1. *Form and sufficiency of findings and order conclusive.*

It will be recalled that under the State Reparation

Statute the Department enters its findings and order and the statute permits review of the "reasonableness and lawfulness" of the findings and order to the Superior Court and then to the Supreme Court of the State of Washington. This is explained in *Willapa Power Co. v. Public Service Commission,* 110 Wash. 193, 195. In this respect the procedure differs vitally from that under the Interstate Commerce Commission statute. Under the procedure provided by that statute, the Interstate Commerce Commission enters findings and order in a reparation case with no provision for review to the District Court, then to the Circuit Court of Appeals and then to the Supreme Court of the United States. The first time that the findings and order of the Commission may be the subject of judicial scrutiny is when a suit is brought in the District Court to recover the reparation awarded. At that time for the first time is there any scrutiny of the validity or form of the findings and order. (49 U. S. C. A. 16 (1), (2).)

Under the state procedure the Superior Court and the Supreme Court of Washington act judicially in examining into the reasonableness and lawfulness of the findings and order of the Commission. Unlike the 1909 Act, which empowered the Supreme Court not only to set aside the findings and order of the

Commission for error but also to make new and corect findings to take the place of those set aside, the 1911 and 1921 Acts give no right to make substitute findings. The court merely determines if the findings and order are reasonable and lawful, and in connection with that determination, determines whether the findings are supported by the evidence and the order by the findings.

Laws of '11, Ch. 117, §§ 86, 89;

Great Northern Ry. Co. v. Department of Public Works, 161 Wash. 29.

Such a determination is judicial in character and not administrative or legislative.

Bacon v. Rutland R. Co., 232 U. S. 134, 34 S. Ct. 283;

Prendergast v. New York Telephone Co., 262 U. S. 43, 43 S. Ct. 466;

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527;

Nappa Valley Electric Co. v. Railroad Commission of Cal., 257 Fed. 197.

It is true that appellant contends that the action of the Supreme Court is legislative and not judicial in character, relying upon dicta in Judge Neterer's decision denying motion to remand. (App. Br. 16). But Judge Neterer, it is submitted, fell into error in so stating for he relied on the case of *Puget Sound*

Electric R. R. Co. v. Lee, 207 Fed. 860, involving the character of proceedings by the Public Service Commission and the Supreme Court of Washington under the Laws of 1909. As has already been pointed out, and as pointed out by Judge Neterer in his opinion, the 1909 statutes gave the court the power to set aside findings for error and to substitute new and correct findings. He too recognized that as pointed out in *Prentis v. Atlantic Coast Line Co.,* 29 S. Ct. 67, such power is legislative, not judicial. Judge Neterer therefore failed to consider the fact that the 1911 Act, by eliminating the power to make substitute findings, changed the character of the court's action from legislative to judicial.

The Supreme Court of Washington having decided judicially in *Northern Pacific R. Co. v. Sauk River Lumber Co.,* 160 Wash. 691, that the findings are sufficient and that the order is supported by the findings, the Federal Court is bound by such determination irrespective of the view it might take independently but for such determination.

See *Northern Pacific R. Co. v. Baker,* 3 Fed. Supp. 1. In that case a suit to enjoin the Department of Public Works from putting into effect a confiscatory rate order was brought before a three Judge court.

The appeal procedure in the state courts had not been resorted to by the carriers. It was, therefore, an open question whether the findings were proper and supported the order. In determining that question, the court turned to the decisions of the Supreme Court of Washington. Referring to the case of *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, the court said, p. 6:

> "If the Supreme Court of the State in the above case decided the case upon its construction of the State Statute, and, as a second ground, upon the lack of evidence to support the findings of the Department that the rate in question was unreasonable, the case is authority upon both points."

As above pointed out, the statute permits a review not only of the reasonableness of the order, but of its "lawfulness." (Laws of 11, Ch. 117, § 86). Whether the findings and order comply with the law both as to form and substance would clearly seem to be comprehended within the meaning of "lawful". If the findings and order were not in proper form, were not "direct and certain" or included improper matter, it was the duty of the carrier to have raised these questions by appeal or cross-appeal when the matter was submitted to the Courts of Washington. Had this matter been submitted to the courts, they might easily have remanded the case to the Department for

the purpose of redrafting the findings and order in lawful form instead of reinstating the findings and award of the Department as the Supreme Court did. In such a direct proceeding, counsel might, with better grace, have relied upon cases such as *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, 31, (cited App. Br. 256, 7, and followed in *Northern Pacific R. Co. v. Baker,* 3 Fed. Supp. 1) because the attack would have been direct instead of collateral. Direct attacks upon the validity of findings and order have been made not only in the State of Washington, but under the statutes of other states.

Peoples Fruit & Vegetable S. Assn. v. Ill. Com. Com'n, 184 N. E. (Ill.) 615;

Yowell v. Cleveland, C. C. & St. L. R. Co., 195 N. E. (Ill.) 667.

But to attempt, as appellant does in this case, to attack the lawfulness, i. e., form and sufficiency, and reasonableness of the findings and order of the Commission after they have been affirmed by the Supreme Court of Washington is a collateral attack upon such findings and order and is not available to the appellant.

The principle of the following cases is applicable:

Willipa Power Co. v. Public Service Com., 110 Wash. 193, 195, calling attention to the fact that only

if the order of the Commission is void is collateral attack permitted.

S. D. Warren Co. v. Maine Central R. Co., 135 Atl. (Me.) 526;

Public Service Com. v. City of Indianapolis, 137 N. E. (Ind.) 705;

Alabama Water Co. v. City of Attalla, 100 So. (Ala.) 490;

Southern Indiana R. Co. v. Railroad Com. of Indiana, 87 N. E. (Ind.) 966;

West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co., 15 S. W. (2d) (Tex.) 558, (Railroad Commission's interpretation on order or rule of the commission becomes part of the rule not subject to collateral attack.)

Texas Steel Co. v. Fort Worth & D. C. R. Co., 45 S. W. (2d) (Tex.) 794;

See also *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696. In action by sewer company against county to recover some claim for sewer service furnished, held whether the rates fixed by commission were unreasonable is a collateral question and will not be considered.

Also *Glen Falls Portland Cement Co. v. Delaware & Hudson Co.,* 66 F. (2) 490 (C. C. A. 2), holding that in suit to enforce reparation order for unreasonable rates charged, I. C. C. finding that rates were unreasonable is conclusive and evidence to the con-

trary cannot be introduced either as to past or future rates.

Batesville Telephone Co. v. Public Service Commission of Indiana, 38 Fed. (2d) 511;

New York and Pa. Co. v. New York Central R. Co., 126 Atl. (Pa.) 382;

Western R. Co. of Alabama v. Montgomery County, 153 So. (Ala.) 622.

Attention is also called to the fact that Laws of '11 ch. 117, §99 provide that the commission's order shall be conclusive unless set aside or annulled in a review as in the act provided.

It follows that the various cases cited by appellant on the question of the proper form of the findings (App. Br. 259-275) are not in point because they arise under the Interstate Commerce Commission Act, which Act, as has been above pointed out, has no provision similar to that of Washington for reviewing the reasonableness and lawfulness of the order in an independent judicial proceeding.

It is therefore submitted that the sufficiency of the findings and order, both as to form and substance, having been judicially determined by the Supreme Court of Washington, is either binding upon the Federal Court or at any rate highly persuasive, and that

therefore the objection urged to the admission of plaintiff's Exhibit 1 was properly overruled.

2. *Items to which objections are made are not improper.*

While appellant contended that the improper matters could not be culled out from the findings and order, it specifically objected to specific portions of the findings and the whole of the order, which objections are made the subject of assignments of error 5 to 22, inclusive.

Assuming that it is proper in this collateral attack to examine into the question of proper form of findings and order, it is first to be pointed out that nowhere do the statutes of the State of Washington prescribe the form and nowhere do those statutes say that findings and order in improper form are inadmissible, or that the portions that are improper, if embodied in the findings and order, are inadmissible. On the contrary, in the case of *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, 32, in which the court in a direct attack upon the findings pointed out that they should be direct and certain, also stated:

> "It is not objectionable, of course, that the Department state the contentions of the parties or arguments used by them which it conceives

support, or militate against, the facts as found by it. . . . ''

As better form, the court also then proceeded to point out:

'' . . . but if uncertainty is to be avoided, these should be separately stated and not confused one with the other in the findings.''

Later in its decision, determining whether the findings were sufficient to support the order, the court said:

p. 34. ''However, the Department did find that 'the rate assailed is, and for the future will be, unreasonable to the extent that it exceeds 9 cents,' and this, possibly, is a sufficient finding to support its order, if there is substantial evidence in its support.''

Bearing these matters in mind, let us consider assignments of error 5 to 22, inclusive:

(a) Assignment 5. (Tr. 407).

The last three lines of finding 8 are clearly proper to explain finding 23, which adopts the Bureau method of scaling logs as correct.

(b) Assignment 6. (Tr. 407).

Finding 9 is essential in order to make finding 23 understandable.

(c) Assignment 7. (Tr. 408).

Finding 7 is essential to understand finding 23.

(d) Assignment 8. (Tr. 409).

This is a statement of a contention which helps to make finding 23 intelligible and which is clearly permissible even as a contention under the above cited *Great Northern Railway Co.* case.

(e) Assignment 9. (Tr. 410).

This is a finding helpful in making finding 23 intelligible and is likewise permissible under the *Great Northern Railway Co.* case, supra.

(f) Assignment 10. (Tr. 411).

This helps make finding 22 intelligible, and is permissible under the *Great Northern Railway Co.* case supra.

(g) Assignment 11. (Tr. 411).

A statement of the testimony helps explain findings 22 and 23, and while no more necessary than the statement of a contention, comes within the same principle. *Great Northern Railway Co.* case, supra.

(h) Assignment 12. (Tr. 412).

The same reasoning applies here as applies to Assignment 11.

(i) Assignment 13. (Tr. 413).

This is clearly a finding based upon the recitation of the preceding subsidiary findings and helps explain

the necessity for finding 22, and likewise comes within the principle of the *Great Northern Railway Co.* case, supra.

(j) Assignments 14 to 16, inclusive. (Tr. 414-418).

It is, of course, no more necessary to state the law in the findings than it is to state the contention of the parties, but it helps to explain the ultimate finding 22 as to the proper interpretation of board measure. It comes within the same principle as that permitting the statement of contentions. It is separately and distinctly stated and is not intermingled with any statements as to what the evidence in the case disclosed. Furthermore, the statements of the law therein contained are correct and applicable, and therefore not prejudicial even if inadmissible in the particular form in which presented. See *Gallagher v. Town of Buckley,* 31 Wash. 380, 384.

(k) Assignment 17. (Tr. 418).

This paragraph helps explain finding 22 and comes within the same principle heretofore suggested in the *Great Northern Railway Co.* case, supra.

(l) Assignment 18. (Tr. 419).

This finding helps explain finding 23, and is in answer to the carrier's contention that the Bureau scalers were inaccurate. This clearly comes within the *Great Northern Railway Co.* case, supra.

(m) Assignment 19. (Tr. 420).

This is clearly an essential finding. How else the Commission would have been justified in rendering reparation it is impossible to see. The objection here made is clearly frivolous.

(n) Assignment 20. (Tr. 420).

The same argument applies to assignment 20 as applies to assignment 19. Furthermore, the form of the finding comes within the language of the *Great Northern Railway Co.* case, supra.

(o) Assignment 21. (Tr. 421).

The same argument as was made to assignments 19 and 20 applies to this assignment.

(p) Assignment 22. (Tr. 421).

The admission of the order in evidene was clearly proper under the express terms of the statute which provide not only that the findings but the findings *and order* of the Department shall be admitted. Furthermore, the order expressly incorporates in itself by reference the findings of fact upon which it is based. (Tr. 422).

It is respectfully submitted, therefore, that under the decision of the Supreme Court of Washington, there is nothing improper or prejudicial in the find-

ings and order that require rejection of the whole or deletion of parts.

3. *In any event, the remedy is in the court's instructions.*

It will be recalled that the statute (Rem. Rev. Stat. 10433) provides that the "findings and order of the commission shall be *prima facie* evidence of the facts therein stated." That means the whole findings and order, and not such a part of the findings and order as a trial court finds constitutes findings and other after the Supreme Court has held them sufficient. Indeed, the very cases cited by appellant indicate that exclusion is not the only remedy, even under the Interstate Commerce Act, but that a proper method of presenting the matter is admission in the light of the court's instructions. Thus in *Western New York & P. R. Co. v. Penn. Refining Co.,* 137 Fed. 343, C. C. A. 3rd. (cited App. br. 259) the decision was reversed because to use the court's language (App. br. 262):

> "Not only did the paragraph in question from the report of the Commission include conclusions of law, *but the jury was instructed that these conclusions were findings of fact. In this there was error. . . .*"

Further, the court said, (App. br. 262):

"While not expressing the opinion that find-

> ings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter and direct that the latter be wholly disregarded."

In *Lehigh Valley R. Co. v. Meeker,* 211 Fed. 785, (App. br. 265), the action of the trial court in admitting an I. C. C. report containing improper matter was held error because (App. br. 269):

> "The court gave the jury to understand that the report of findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this we think the court was clearly in error."

On certiorari the Supreme Court of the United States, though holding that error as to the admission of a report was waived for lack of appropriate objection or requested instruction, held (App. br. 272):

> "If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged."

Furthermore, the court assumes that findings interwoven with other improper matter does not render the whole report inadmissible, for it states, (App. br. 272):

> "True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them. . . "

In the second *Meeker* case, (App. br. 274), the court said:

> "It hardly could be said that the presence of some irrelevant matters rendered the whole report inadmissible."

In the case at bar, the court admitted the whole of plaintiff's Exhibit 1, but limited its effect as follows in its instruction to the jury at the time of admission (Tr. 104):

> "THE COURT: Plaintiff's Exhibit 1 for identification has been offered and is now offered in evidence. Certain objections to it and to parts of it have been made as shown by the record by counsel for the defendant. I understand that the manner of identification and authentication is not questioned, and that it is the findings and order of the Department of Public Works concerning the matter of the alleged overcharge in question in this suit. The exhibit is now admitted in evidence as prima facie evidence of the facts therein stated."

In its charge to the jury, the court stated, (Tr. 316-318):

> "The Findings and Order of the Department of Public Works of the State of Washington touching the subject of this action have been

received in evidence before you, and the statute of that state makes such findings and order 'prima facie evidence of the facts therein stated.'

"You will note that it is 'the facts therein stated,' not the liability of the defendant, of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor statements, comments or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. You are not to consider anything contained in those findings and order except the facts therein stated.

"It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instrutions."

The court then proceeded to define the meaning of prima facie evidence, concerning which further argument will be made in answer to appellant's exceptions.

It will be seen, therefore, that appellant cannot claim to be prejudiced in light of the court's instructions. The method that the court uses in stating that the findings and order were prima facie evidence of the facts therein stated was clearly a matter in the trial court's discretion. It was not bound to give voluminous instructions to the jury as to what was and what was not a fact, or what was or what was not a contention, even if the question were still open for the court to do so. It will be remembered that the

instructions do not and did not go to the jury. It would have only resulted in confusing the jury to have attempted a more elaborate statement of the matter by the court. It is submitted the trial court did not abuse its discretion in the manner in which the jury were instructed and the appellant cannot claim prejudice.

The essential facts found in the findings were based on substantial evidence as the Supreme Court of Washington held, and the appellant must be deemed to have had a fair hearing before the commission. In light of these substantial facts, the technical objections raised by appellant, even if well taken, cannot be deemed to be prejudicial within the principle of *Western Railway of Alabama v. Montgomery County,* 153 So. (Ala.) 622, 625.

ANSWER TO NO. 23

(Tr. 107, 423; App. br. 125, 137, 146, 159, 172, 181, 192, 212, 247.)

Appellant assigns as error the refusal of the court to sustain defendant's challenge to the sufficiency of the evidence and motion for non-suit, or in the alternative, for directed verdict on the ground of insufficient facts to warrant recovery for plaintiff. This assignment of error is argued on a number of grounds,

which argument is also applicable to a number of other assignments of error as will be noted hereinafter under their proper heading. We shall consider each of the ten arguments made in support of this assignment.

1. Appellant argues tariff 51 is not ambiguous. We contend tariff 51 is ambiguous for two reasons:

(1). The Department and the Supreme Court of Washington so hold, making that holding a law of the state and binding upon the Federal Court.

(2). The term "board measure" in any case is a trade term and therefore subject to construction and interpretation based on parol evidence.

(1). It is the duty of the Department of Public Works to administer the Public Service Commission law, for it is provided in Rem. Rev. Stat. 10450:

> "It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal."

Rem. Rev. Stat. 10448 provides:

> "In all actions between private parties and public service companies involving any rule or order of the commission, and in all actions for the recovery of penalties provided for in this act, or for the enforcement of the orders or rules issued and promulgated by the commission, the

> said orders and rules shall be conclusive unless set aside or annulled in a review as in this act provided."

The departmental interpretation of board measure in tariff 51 filed pursuant to the requirements of Laws of '11, page 548, Rem. Rev. Stat. 10350, was affirmed by the Supreme Court of Washington, the court saying, 160 Wash. 691:

> "The tariff under which the logs moved not defining board measure, when the matter was presented it became primarily a question for the Department of Public Works to determine. . . . The Department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs. If it had adopted the railroad's method of scaling, that likewise would have become effective as to all shipments moving in this state."

The findings affirmed by the Supreme Court, therefore have a dual character. Insofar as findings of fact are concerned, their legal effect is to constitute prima facie evidence. Insofar as the interpretation placed upon the tariff is concerned, that is a function which the statute fixed in the Department subject to review by the Supreme Court, and upon review, if affirmed, becomes the law of the state, binding upon state and federal courts alike.

The tariff, so long as it is in force, is like a statute, (*Pennsylvania R. Co. v. International Coal Co.,* 230

U. S. 184, 197) and the construction of such a statute by the body primarily charged with its construction after affirmance by the Supreme Court, is a construction which in effect is part of the statutory law of Washington and binding on shipper, carrier and the courts. The Supreme Court having held that the term "board measure" is subject to construction, the appellant cannot now contend that it is not.

(2). Assuming, however, that the question is still open, it appears beyond question that the term "board measure" is subject to interpretation and construction. While appellant states that the only testimony is that board measure is not ambiguous, (App. br. 131) it overlooks the mass of testimony admitted to show that other railroads use the commercial scale in computing their freight charges under the identical tariff 51; that the logging industry and log shippers use the commercial scale in computing their freight charges; that the Department and the Supreme Court of Washington likewise interpreted board measure to mean board measure commercial scale. The appellant, however, is the only one contending that there is no ambiguity latent or patent in the term. No authorities are cited for the position taken. Appellant's contention overlooks the principle stated in 22 C. J. 1204 as follows:

> "*Words having both popular and technical meaning.* It is not necessarv in order that this rule may apply that the word or phrase should have no fixed meaning in ordinary usage, for even though it has such a meaning, yet if it also has a technical meaning in the language of commerce or art, parol evidence is admisssible to show that it was used in the latter sense . . . "

Numerous illustrations of this principle are then given.

In *Hurst v. W. J. Lake & Co.,* 16 Pac. (2d) (Ore.) 627, the court stated the law as follows:

> " . . . We state our conclusion that members of a trade or business club who have employed in their contracts trade terms, are entitled to prove that fact in their litigation. . . We believe it safe to assume, in the absence of evidence to the contrary, that when tradesmen employ trade terms, they attach to them their trade significance. If, when they write their trade terms into their contracts, they mean to strip the terms of their special significance and demote them to their common import, it would seem reasonable to believe that they would so state in their agreement. Otherwise they would refrain from using a trade term and express themselves in other language."

In *Paepcke-Leicht Lumber Co. v. Talley,* 153 S. W. (Ark.) 833, there was involved an action to recover damages for breach of contract whereby plaintiff agreed to sell lumber at the price of "$14.00 per thousand feet board measure . . . "

In holding contrary to the defendant's contention

in that case that board measure had its ordinary meaning (just as appellant here contends), the court said, page 836:

> "Now, a literal interpretation of the term 'board measure' would imply a measurement of lumber, like all other substances having the three dimensions of length, width, and thickness, according to the number of cubic inches contained in the surface of one foot; that is to say, the unit of one foot should be counted as one foot long, one foot wide, and one inch thick, which is equivalent to 144 cubic inches of lumber. But the use of that term does not necessarily imply the intention to give it its literal meaning, for it may mean only the manner in which a board is ordinarily measured; and it is subject to explanation according to the particular circumstances under which it is used. In other words, it was competent to show that it is a commercial term, and is understood to imply a particular meaning in commercial circles. According to the great preponderance of the testimony, the custom is well-nigh universal in the lumber trade for sales to be made in accordance with the measurement contended for by the plaintiff as to lumber less than one inch in thickness; and there is some testimony to the effect that the term 'board measure' is generally understood to mean the surface measurement of boards one inch, and less, in thickness."

It will be remembered that the term "board measure" was originally used in the Long-Woodworth agreement immediately before the filing of tariff 51. It was used by lumber and railroad men engaged and long engaged in the shipment of logs. It is not con-

tended by appellant that the use of the term board measure as used in the Long-Woodworth agreement was changed in any respect by the use of that term in tariff 51. Under these circumstances it is clear that the term board measure was used as a trade term, and subject, therefore, to interpretation and construction. See *Union Wire Rope Corp. v. Atcheson etc. Ry. Co.,* 66 F. (2) 965 (C. C. A. 8th) involving undefined trade terms in tariff.

Appellant contends that the exception in tariff 51 (App. br. 131, 135) removes any ambiguity that might otherwise exist as to the meaning of the term "board measure". But this it fails to do, for the question remains whether board measure is implied in the exception as it is implied in the use of the phrase dealing with rates "rates in cents per thousand feet," (App. br. 131). Furthermore the question remains whether the exception was intended to be a basis for rate measurement or merely a checking up device.

Appellant then contends that trade usage in the Puget Sound area does not create ambiguity. (App. br. 133-135). But even if this were true, there were other reasons that warranted construction of the term "board measure," particularly the practice of other carriers under tariff 51 of interpreting tariff 51 to mean "board measure commercial scale".

2. Appellant contends in passing that plaintiff did not comply with the exception in tariff 51 (App. br. 135) in failing to give the carrier the actual number of feet of logs in each car as shown by mill overrun. The answer to this contention is as follows:

(1). If tariff 51 means "board measure commercial scale" by the use of the Scribner Decimal "C" stick, the objection must fall.

(2). The exception reasonably interpreted does not mean literally the *actual* number of feet of logs on each car, because the carrier's own construction of the tariff is to the contrary as shown by its practice is to measure the content of logs by the use of the Scribner Decimal "C" Scale. The use of that scale itself, without any deductions for defects, results in mill overrun, as appears from the excerpt from appellant's brief page 135. As the Supreme Court said in *Northern Pacific R. Co. v. Sauk River Lumber Co.,* 160 Wash. 691, in holding evidence of mill overrun immaterial:

> "No method of scaling can be mathematically correct and determine by the scale the exact amount of lumber that may be cut from a log. . . . Of course, it would be impractical to base a freight rate, and collect therefor, upon the basis of the actual cut at the mill from the logs."

(3). If appellant's contention were correct, recov-

ery in overcharge cases would be impossible where the carrier had dumped the logs so that the car identity had been lost. This would be true even if the carrier itself applied the wrong principle in measuring the logs. It would enable the carrier to profit by its own wrong. Such an interpretation is to be rejected.

(4). The objection is untenable in any event, because the carrier itself scaled the logs. The plaintiff is merely offering the best evidene it can as to the number of feet of logs on the cars. The departmental finding as to the correctness of its evidence has been affirmed by the Supreme Court and accepted by the jury. To contend, therefore, that appellee failed to make out a cause of action because it did not measure the actual number of board feet carried on each car would seem erroneous indeed.

3. Appellant contends that in any event the construction permitting commercial scale to govern is erroneous. (App. br. 137). It argues that the construction reads the exception out of tariff 51, and that it is unreasonable since it results in the carriage of logs or parts of logs without compensation, and further enables shippers to change the freight rates by changing the definition of a cull. The answer to these contentions is:

(1). The method of ascertaining the meaning of the tariff has been conclusively stated by the Department of Public Works and the Supreme Court of Washington, and is part of the law of the State of Washington. It is no longer an open question that is subject to collateral attack.

(2). Appellant's interpretation reads the term board measure out of the tariff, since board measure is a trade term. It is an attempt to make the exception which might have been adopted for checking rather than rate making purposes do the work of a proper definition of the sense in which board measure was used. It is by no means a necessary or inevitable interpretation of tariff 51 that because item 50 deals with scaling that it necessarily deals with scaling for rate making purposes.

(3). Nor is the interpretation of the commercial scale unreasonable on the ground that it results in the carriage of logs without charge. It is to be conclusively presumed in this proceeding that the rates are reasonable and are adjusted to the fact that culls and other defects are not to be charged for. *Hence there is no free carriage in fact, despite the form of the matter.* If the compensation is inadequate there is a rate making procedure available for the purpose of fixing adequate rates. What is involved in the

position taken by appellant is a collateral attack on the sufficiency of the rates under the guise of an aid to interpretation (See Br. p. 92).

Tonopah Sewer & Dr. Co. v. Nye County, 254 Pac. (Nev.) 696;

Northern Pacific Railway Co. v. Sauk River Lumber Co., 160 Pac. 691;

State ex rel v. Department of Public Works, 149 Wash. 129, 134.

(4). Appellant contends that it is within the shipper's power to change the freight rates by changing the definition of a cull. There are two answers to this contention:

(a). A carrier may under the statute file a scaling rule that will protect itself against such action. (R. R. S. 10350).

(b). It is not to the shipper's interest to change the definition of a cull or add deductible defects for the purpose of saving $2.50 per thousand on freight and losing $15.00 per thousand on the selling price; hence the danger suggested is not only remote, but highly unlikely. As the appellant's witness Mr. Evans testified:

> (Tr. 117). "It is true that the more footage that is scaled under the commercial scale the more the logger gets from the mill. It is, therefore, to the logger's interest to get as large a scale as he can out of his logs."

4. Practical Construction.

Appellant contends (App. br. 146) that under the undisputed evidence of practical construction of the tariff by both appellant and appellee, tariff 51 means board measure Northern Pacific scale, and can only mean that. Our answer is:

(1). The method of ascertaining the meaning of tariff 51 has been conclusively settled by the Department and the Supreme Court of Washington contrary to appellant's contention, and it is no longer an open question in this case for collateral attack.

(2). If open, the evidence fails to show the practical construction contended for by appellant. Tariff 51 under which this proceeding was held and which for the first time in an effective tariff used the term board measure (Tr. 274), had only been filed since October 1, 1925. (Tr. 212). The practical construction of that tariff was not uniform on the part of the carriers. It was a joint tariff, and apparently the Northern Pacific was using its so-called Northern Pacific scale, and the other carriers parties to the tariff, such as the Milwaukee and Great Northern, were using the commercal scale. (Tr. 250, 261, 264, 265). Therefore there was no uniform practical construction.

Furthermore, the rule as to practical construction

is based upon a practice knowingly indulged in by both shipper and carrier, as the cases cited by appellant clearly disclose. (App. br. 147-154). Yet the evidence is that shippers on the Great Northern and Milwaukee lines use the commercial method in scaling, and the Sauk River Lumber Company assumed that the Northern Pacific was using the commercial scale. (See Br. p. 7). There was no evidence that the Sauk River Lumber Co. checked the action of the Northern Pacific Railway in scaling until Mr. Jamison employed Mr. Fishbeck to act as joint scaler for the Sauk River Lumber Company and Northern Pacific in 1927, so that he could determine what was wrong with what seemed to be an excessive scale. (Tr. 277). So far as the compromise agreement evidenced by letters set out in Appellant's brief 156, 157, are concerned, it will be noted that Mr. Jamison offered to compromise the overscale at the suggestion of Mr. Evans, the Northern Pacific head scaler, (Tr. 277) and in his offer to compromise he did not offer a compromise on the basis of any alleged full Northern Pacific scale, but on the basis of the commercial scale, less 50% of the gross scale for cull logs. That was clearly a compromise offer. This was especially evident when the last sentence of his letter (Tr. 159) is read, reading:

> "*In this instance,* we are willing to add to our commercial selling scale all deductions and 50% of the gross scale of all culls and take that figure for the basis of adjustment." (Italics ours).

The fact that settlement was made on the basis of the Bureau scale plus deductions as a matter of compromise is certainly no indication of any acquiescence on the part of the Sauk River Lumber Company that the commercial scale should not be used. When a man is owed money, he is willing to compromise his rights for the purpose of saving the expense incident to asserting them. In view of this fact, it certainly cannot be said that the undisputed evidence shows that the shippers acquiesced in any alleged Northern Pacific Scale. (See Br. p. 7).

Furthermore, the construction contended for by the Northern Pacific would result in discrimination between shippers under the same tariff. Shippers on the Milwaukee and Great Northern paid on the basis of the commercial scale. The Northern Pacific contends that shippers on the Northern Pacific should pay on the basis of the Northern Pacific Scale. In view of the fact that freight charges are all computed on the basis of the same joint tariff 51, such an interpretation is clearly discriminatory and to be avoided.

Finally, practical construction in any event isn't

binding or conclusive as appears from appellant's brief page 152. At most it is merely one aid, and only one, to the determination of what a tariff means.

It is submitted, therefore, that practical construction of the tariff would favor the appellee rather than appellant, and that appellant's argument based on practical construction must fail.

5. Contention that commercial scale results in an interpretation which renders the tariff illegal. (App. br. 159).

More specifically, the illegality consists in alleged confiscation, discrimination and free carriage. Our position is:

(1). The question of how to ascertain the meaning of tariff 51 is no longer an open question, having been settled by the Department and the Supreme Court of Washington.

(2). If not settled, the question of sufficiency of rates on the issues of confiscation, discrimination and free carriage, is irrelevant in this proceeding.

(3). In any event, the evidence offered as to confiscation, discrimination and free carriage purporting to apply only to one party to joint tariff No. 51, namely the Northern Pacific, was inadmissible, since

the evidence should have been offered as to all carriers.

We shall discuss each contention in turn.

(1). That the decision of the Department and the Supreme Court of Washington is as to method of interpretation conclusive and not subject to collateral attack as to the meaning of tariff 51 has already been discussed. (Br. pp. 17, 60, 78).

(2). In any event, the question of the sufficiency of rates to prevent confiscation, free carriage and discrimination is a question which shoud be raised in a direct proceeding provided for that purpose by the statutes of the State of Washington. In a reparation proceeding, the question of the sufficiency of the rates as bearing upon the meaning of the tariff is immaterial. The qustion is, what does the tariff mean, not, will the tariff as construed result in a sufficiency of rates. In a collateral proceeding, it is conclusively presumed that the rates filed are sufficient until set aside in the manner provided by statute. That the question of the sufficiency of rates is immaterial in a reparation proceeding, see *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691;

State ex rel v. Department of Public Works, 149 Wash. 129, 134;

See Robinson v. Wolverton Auto Bus Co., 163 Wash. 160, 163;

Tonopah Sewer & Dr. Co. v. Nye County, 254 Pac. (Nev.) 696;

Mellon v. Johnson Co., 219 N. W. (Wis.) 352, 353.

It will be remembered that tariff 51 was *voluntarily* filed by carriers. This is not a case where the Department compelled the carriers to fix a confiscatory, discriminatory and unlawful rate. We are concerned here in interpreting the voluntary action of the carriers themselves. According to the appellant's own testimony, the rate filed at $2.50 per thousand was less than the rates under tariff 29, which the carriers had filed as a reasonable rate, and which they claimed was put into effect when the Supreme Court of the United States reversed the action of the Department of Public Works in fixing a confiscatory rate. Under tariff 29 the rate charged was $3.20 per thousand feet. Under tariff 51 the carriers, as a matter of compromise, voluntarily filed a rate of $2.50 per thousand feet, which according to their own contention at the time was less than reasonable. (App. br. 23, 24). If the cariers can now turn around when an action is brought to construe the very tariff they voluntarily filed and contend that the departmental construction of commercial scale renders the tariff confiscatory, the car-

riers might just as well contend that the rate of $2.50 is void because confiscatory, and that a reasonable rate such as $3.20 per thousand feet should be charged. The absurdity of this position is apparent. One cannot voluntarily do something claimed by him to be unwise and then claim that the legal consequences flowing from such voluntary act deprive him of due process.

In *Pennsylvania Fire Ins. Co. v. Gold Issue etc. Co.*, 243 U. S. 93, 37 S. Ct. 344, the court through Mr. Justice Holmes pointed out in distinguishing between a voluntary consent and a statutory consent, which is, of course, involuntary in character:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."

What the carrier in this instance by its voluntary act has in effect done is to waive its right to invoke the due process clause on this point.

The various cases cited by appellant on the question of legal and illegal interpretation, it should also be pointed out, are cases either of direct attacks in a rate making proceeding on the sufficiency of the rates, or under the Interstate Commerce Commission Act in which the rates are assailed for the first time when

the order reaches the first trial court. (App. Br. 161-165). This is quite different from rates fixed under a state act with a special procedure as to how the sufficiency of rates shall be fixed and determined.

From what has been said, it must also appear that the contention as to the interpretation resulting in free carriage of cull logs must also fall. It must be conclusively presumed in this proceeding that the rates are adjusted to the fact that cull logs will be carried without ostensible charge. It is not necessary that there be an ostensible charge for each unit carried. It is perfectly possible to make a charge for certain units carried in contemplation of the fact that other units will not be used for the purpose of calculating the amount of freight to be charged. Naturally there will be a higher rate to be charged upon the fewer units which furnish the basis of calculation, but in substance there will be a payment made for all the freight carried irrespective of the form or method by which the amount of freight is calculated.

Furthermore, the existence of free carriage is not as serious as appellant contends it is. It will be recalled that under tariff 51 the shipper is required to pay a minimum on the basis of 6,000 feet per car, whether he actually ships that number of feet or not. Indeed, as appears from the findings of fact, the

shipper in his calculations was compelled to pay for the difference between 71,794,990 feet and 70,326,280 feet at $2.50 per thousand, or $3,671.78 (Tr. 80, 81), said sum being paid even though logs were not actually shipped on the cars to make up the 6,000 foot minimum. This figure of $3,671.78 should be compared with the freight on culls which appellant contends should have been paid, amounting to $4,069.73. (App. br. 171). The foregoing facts furnish some justification, therefore, for Mr. Jamison's statement (Tr. 278):

> "I do not think that the railway should charge for hauling culls if there is a minimum based on commercial scale."

Nor should the fact that culls are occasionally shipped because of the difficulty of telling a cull in the woods and in such cases occasionally salvaged for wood purposes, obscure the important facts. It will be remembered that a shipper who sells culls to a buyer for lumber purposes gets nothing for them from him, any more than he gets anything for the board measure which would be contained in the defects of timber. It is, therefore, not to the interest of the shipper to go to the trouble of cutting, loading and shipping culls when he gets, if he gets anything, not more than one fifth of the ordinary price of logs.

(Tr. 238). There is no evidence in this case that culls were cut and shipped as a commercial matter. The evidence is merely that when they were inadvertently shipped they were sometimes salvaged and sold for wood.

While we call attention to these matters in order to minimize the so-called free carriage, we particularly do not wish to obscure the fact that in this proceeding the rates must be conclusively presumed to be adjusted to the fact that such free carriage in form as may exist has been taken into account in fixing the rates.

Illustrative of this principle is the fact that even the appellant's Scribner Decimal "C" Scale does not measure the full mercantile content of the log as is shown by so-called mill overrun, and that to the extent that it does not do so, there results free carriage in form though not in fact.

But appellant states that the application of the commercial scale would render tariff 51 discriminatory, (App. br. 168), because different commercial scales are used in different logging districts. But the evidence is that the commercial method of deductions is the same in all districts. The only difference in the districts is the method of measuring the gross content, which methods result in a small difference.

(Br. pp. 4, 5). But the interpretation given by the Department is that the Scribner Decimal "C" Stick is the proper method of measuring the gross content. Hence the measurement of gross content may be as uniform when the commercial scale is used as it is when the so-called Northern Pacific scale is used. Furthermore, deductions for defects and culls being uniform, the gross scale less deductions will likewise be uniform when it comes to measuring board measure for freight purposes. No discrimination can therefore possibly result from the interpretation placed upon tariff 51 by the Department and the Supreme Court of Washington. As that court said in its decision:

> "It is said that this construction will result in discrimination, but we think just the opposite is the effect. The Department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs.'

On the contrary, the Northern Pacific interpretation does result in discrimination since shippers on the Milwaukee and Great Northern have received the benefit of the commercial scale under the same tariff 51. That was why the Supreme Court of Washington in the aforesaid decision also called attention to the fact:

> "Inferentially, it appears that the other railway companies which were parties to the tariff

have carried logs for charges which were based upon the scale of the scaling bureau.'

(3) It will be remembered that tariff 51 is a joint tariff, application not only to the Northern Pacific but to the Milwaukee, Great Northern and Oregon-Washington railways. It would be wholly incompetent for a construction of a joint tariff to rest upon the question whether the rates and charges prescribed in such joint tariff are sufficient to yield one of the carriers a sufficient return on its investment. Suppose that the rates were insufficient as to one carrier but sufficient as to the other three. Would it be contended that the tariff would be interpreted one way as to the Northern Pacific and another way as to the other carriers, despite the fact that the same language is applicable to all? Unless, therefore, the appellant offered evidence to show the so-called confiscatory character of tariff 51 interpreted so as to require the commercial scale as being confiscatory or discriminatory or resulting in unlawful free carriage as to all the carriers, the evidence offered would clearly be insufficient and inadmissible. That the Northern Pacific intended to confine the evidence only to the practice of the Northern Pacific appears not only from its offers of proof, but also from the vigor with which it

sought to exclude from the testimony the practices of other railway carriers (Tr. 250, 261, 265).

6. Estoppel.

Appellant contends that the evidence shows that the Sauk River Lumber Company knew that the railroad was applying other than the proper and commercial scale during 1926, and that because it delayed protesting to the Northern Pacific until after all the shipments had been made in 1926 that it is estopped to recover in this case (App. Br. 172-180). Our answer is:

(1) This estoppel was not pleaded. The only estoppel pleaded was the so-called estoppel arising from the Long-Woodworth agreement (Tr. 22).

(2) There was no evidence to support this ground at the conclusion of the plaintiff's case in chief.

(3) There was no evidence to support a claim that the Sauk River Lumber Company knew of the Northern Pacific's practice until after 1926.

(4) There could be no estoppel where parties deal at arms length, and where the silence at best amounts to a representation of opinion as to the law.

Discussing each point in turn:

(1) Estoppel is an affirmative defense and must, of course, be pleaded.

Johns v. Clother, 78 Wash. 602, 139 Pac. 755;

Russell v. Mutual Lumber Co., 134 Wash. 508, 236 Pac. 96;

Walker v. Baxter, 6 Wash. 244, 33 Pac. 426.

Not having been pleaded in this case, this contention is not available to appellant.

(2) and (3). Furthermore, the motion in support of which this argument is urged was made at the conclusion of plaintiff's case in chief; but at that time there was no evidence whatsoever as to knowledge or lack of knowledge on the part of the plaintiff of the Northern Pacific practices until after 1926.

Furthermore, it has just been shown, *supra* (Br. p. 7), that the Lumber Company never did know that the Railway Company was using any but the commercial scale. This appeared both in the testimony of Mr. Irving and Mr. Jamison (Br. p. 7, 88). Furthermore, it appeared in defendant's own case that the commercial scale was claimed to be the proper scale within ninety days after tariff 51 was filed. Indeed, when Mr. Jamison made a claim for refund for overcharge, he based his claim

by way of compromise on the commercial scale but allowed 50% of the footage of culls. That claim was first made February 15, 1926 (App. Br. 157), and therefore warrants the statement of Mr. Cleveland that (Tr. 215):

> "I think the Sauk Company first demanded the commercial scale about ninety days after tariff 51 became effective."

Despite the knowledge of the Sauk claim, the Northern Pacific did nothing to protect itself by filing its scale rules. It must follow, therefore, that there is no ground for any alleged estoppel such as that urged.

(4) The circumstances under which tariff 51 was promulgated, were equally known to the Sauk River Lumber Company and to the Northern Pacific Railway Company. It was merely a matter of the proper interpretation of board measure, and that interpretation was equally within the knowledge or power to obtain knowledge of both parties. Under such circumstances, where parties deal at arms length, one party cannot, by failing to assert its interpretation or opinion as to the law, estop itself from relying thereon.

See 21 C. J. 1142;
Turner v. Spokane County, 150 Wash. 524;
Jordan v. Corbin Coals, Ltd., 162 Wash. 503.

Furthermore, there is a public policy involved in requiring the carrier to charge according to rate schedules on file (R. R. S. 10350), whch public policy is not to be defeated by estoppel. Thus it has been generally held that a railway is not estopped from insisting upon its filed rate, even though it has collected less than that rate. Payment is not an accord and satisfaction and the carrier can recover.

See *Melody v. Great Northern Railway Co.,* 127 N. W. (S. D.) 543;

Robinson v. Wolverton Auto Bus Co., 163 Wash. 160;

Jenckes Spinning Co. v. New York etc. Co., 129 Atl. (R. I.) 815;

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541.

It has also been held that a contract for a rate less than a filed rate or subsequently filed rate cannot be the basis of an estoppel against the carrier from enforcing the filed rate.

Producers' Trans. Co. v. Railroad Commission of Cal., 251 U. S. 228, 40 S. Ct. 131, 133.

Seaman v. Minn. & R. R. Railway Co., 149 N. W. (Minn.) 134.

Mellon, Director General of Railroads v. Johnson Co., 219 N. W. (Wis.) 352 (misquotation of rate).

One cannot by the device of estoppel validate a void contract.

Stratford v. Fidelity & Casualty Co., 137 Atl. (Conn.) 13;

Geddis v. Bank, 145 Atl. (N. J.) 731.

For each of the above four numbered reasons the estoppel claimed cannot be asserted.

7. Appellant next contends that motion to dismiss should be granted because appellee failed to show that the rates actually charged were unreasonable to its damage (App. Br. 181). We contend:

(1) That the burden of showing the rates to be unreasonable is on the carrier and not on the shipper, so that motion to dismiss at the end of plaintiff's case in chief was premature.

(2) The Washington statutes do not require damage in addition to proof of overcharge to warrant recovery.

(3) Appellant's authorities are not in point either on proposition (a), that proof of damage is essential in reparation cases under the I. C. C., or (b), that carrier may recover a reasonable freight charge though tariff was not on file, since in this case tariff 51 as construed was filed.

(1) Even if the question of reasonable rates could properly be said to be in this case on the theory that they might be collaterally inquired into, the presumption would be that the rates named in tariff 51 were reasonable and sufficient, thereby placing upon the defendant the burden of showing that they were not. Hence at the end of the plaintiff's case, there being no evidence that the rates were unreasonable, any motion to dismiss based on the necessity of the plaintiff proving the rates to be unreasonable would necessarily fall, since the presumption that they were reasonable would require the carrier to rebut the same. At this point it might be well to point out the inapplicability of *Atlantic Coast Line R. Co. v. Florida,* 79 L. Ed. 719, cited appellant's brief, p. 191. That case is not in point on a motion to dismiss at the end of the plaintiff's case in chief, since the confiscatory character of the rates has not yet been shown at that stage of the proceedings. But that case is to be distinguished from the case at bar in the following important respects in any event: (a). That was a suit in equity (which if in a law action would have constituted an action for moneys had and received), governed by equitable considerations. (b) The shippers in that case were seeking to take advantage of the procedural blunders of the commission, the substantive decision

of the commission being, however, correct. (c) That was not a reparation case for failure to apply the rate filed properly construed. (d) The rates sought to be applied had been held confiscatory in a direct proceeding. Here the rates have never been held confiscatory in a direct proceeding. On the contrary, they are not only prima facie reasonable, but they are conclusively reasonable in case of a collateral attack. (e) Here the equities are with the shipper, not with the carrier as in the Florida case, because: (1) The shipper is trying to get the same treatment on scaling practices as other carriers give their shippers under the same tariff. (2) If appellant's contention is correct, a carrier would be in a position to treat shippers of the same class differently, and when met with a claim for reparation could always contend that because the rates were insufficient, reparation should be denied. The effect of such a holding would be to permit, through an ingenious argument, the perpetration of discrimination contrary to the very purpose of the statutes forbidding it (R. R. S. 10354, 10356).

No such equities existed in the Florida case. On the contrary, the predominant equity in that case was clearly with the carriers, the shippers in that case seeking to hold the carriers responsible for the pro-

cedural not substantive blunders of the commission.

(2) The state statute does not require damage to be shown in a reparation case other than overcharge (R. R. S. 10433; see also R. R. S. 10422, providing that no complaint shall be dismissed because of the absence of direct damage to the complainant). This point should be noted because the decisions under the I. C. C. requiring damage to be proved rests solely upon the requirements of the statutes and not upon any common law requirement.

(3a) The authority cited requiring a showing of damage is clearly not in point (App. Br. 190). Under the I. C. C. forbidding discrimination, and forbidding a different rate for short and long hauls, the Supreme Court of the United States has held that special damage must be proved, but in reparation cases it has held that no special damage need be proved other than the fact of overcharge. Thus the case of *Davis v. Portland Seed Co.* (App. Br. 190), involved a violation of the long and short haul provision of the I. C. C. Even that case pointed out, 44 S. Ct. 383, that there was a distinction between overcharge and damages. The court quoted with approval from *Pennsylvania R. R. Co. v. International Coal Co.,* 230 U. S. 184, 33 S. Ct. 893:

> "But the English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge . . ."

In *Southern Pacific Co. v. Darnell Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186, ruling contrary to *A. T. & S. T. R. Co. v. Spiller,* 246 Fed. 1, cited appellant's brief, p. 165, the Supreme Court held that damage other than a showing of overcharge was not a required showing. The distinction in the different classes of cases is set out in *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 17, 46 S. Ct. 73, 79:

> "The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 206, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, to be fatal in a suit under Section 2 (Comp. St. §8564) for unjust discrimination, and in Davis v. Portland Seed Co., 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762, to be fatal in a suit under Section 4 (Comp. St. §8566), for violation of the long and short haul clause. The carrier concedes, as it must under Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, that a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

See, *Coad v. Chicago etc. Railway Co.,* 154 N. W. 396;

Ft. Morgan Bean Co. v. Chicago etc. R. Co., 288 Pac. (Kan.) 589.

Sunset Pacific Oil Co. v. Los Angeles etc. Co., 290 Pac. (Cal.) 434.

(3b) Appellant cites cases to the effect that in the absence of a tariff provision a reasonable charge may be collected for freight carried (App. Br. 183). The applicability of this rule to this case seems difficult to follow. Tariff 51 was filed and freight was moved under that tariff. That tariff has been construed to mean rate in cents per thousand feet board measure commercial scale. The rule and the authorities cited for it are therefore inapplicable. When it is said that the carrier should have filed its scaling rule, it is said in connection with the proposition that if board measure means something other than board measure commercial scale as the term is used in trade, the carrier should have filed a scaling rule so stating. This is not a case involving the question as to what is a reasonable scaling method when none is stated in the tariff (compare what is a reasonable freight charge where no rate is filed), but rather what is the meaning of the tariff filed with respect to scaling practices. Appellant's statement of the matter, therefore, misconstrues the issue involved.

It is submitted that appellant's contention as to the necessity of proving damage through unreasonable rates must fall.

8. Unpublished scaling rules.

Appellant next contends that the unpublished scaling rules of the Northern Pacific are binding (App. Br. 192). We contend:

(1) Insofar as this affects the meaning of tariff 51, the question is no longer open.

(2) An unpublished scaling rule is void.

(3) There is no evidence that the same unpublished rule was that of the other carrier parties to tariff 51.

(4) An unpublished scaling rule contrary to a filed tariff is void.

Discussing each contention in turn:

(1) The Supreme Court of Washington construed "board measure" to mean "board measure in its commercial sense," and rejected appellants view of the law. Appellant cannot depart from the law laid down by the Supreme Court of Washington on the point.

(2) R. R. S. 10350 requires:

> "Every common carrier shall file with the commission . . . any rules and regulations which may, in any wise, change, affect or determine any

part or the aggregate of such aforesaid rates, fares and charges . . ."

R. R. S. 10354 provides:

> "No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property . . . than the rates, fares and charges applicable to such transportation *as specified in its schedules filed and in* effect at the time; . . ."

As pointed out in our cross-appellant's brief, pages 15 to 23, the carriers scaling rules were therefore required to be filed to become effective. Indeed, as stated in *Clark v. Southern Railway Co.,* 119 N. E. (Ind.) 539, 542:

> "The schedule of rates, fares and charges and the regulations filed with the Interstate Commerce Commission are binding on both carrier and shipper or passenger . . .
>
> "Any rule or regulation required by the act to be filed with a schedule and which changes, affects or determines the value of the service rendered to the passenger or shipper, is unlawful and void if not so filed. Baltimore etc. Co. v. Hamburger (C. C.), 155 Fed. 849."
>
> To the same effect see *Vanderberg v. Detroit & C. Nav. Co.,* 186 N. W. (Mich.) 477, 478;
>
> See also *Macfadden v. Alabama Great Southern R. Co.,* 241 Fed. 562 (C. C. A. 3rd).

The appellant cites cases (App. Br. 196, 198), which it contends announces the rule that unpublished scaling rules are binding. An examination of the cases

cited will disclose that not one involves the question whether an unpublished scaling rule is binding. The most that the cases can be said to hold is that where for reasons of insufficient evidence or improper procedure, reparation must be denied, the effect of such denial may be to treat an unpublished rule *as if* it were valid (See Cr. App. Reply Br.). Thus, in the Interstate Commerce Commission cases (App. Br. 196, 197), the unpublished rules as to estimated weights were given effect not because they were valid, but because the evidence failed to show that the weights actually charged for were incorrectly computed. Had the evidence been satisfactory on that question, freight upon the actual weight and not upon the weight as calculated by the unfiled rule would have governed. Far from holding that unfiled rules are valid, the cases proceed upon the assumption that they are invalid but that reparation will be denied unless proper proof be made of the actual weights shipped. Any other view would read out of the statute the mandatory requirement about filing all rules.

In *Suffern Hunt & Co. v. Indiana Decatur & Western R. Co.,* 7 I. C. C. 255, it was held that rules or regulations promulgated by the carrier in circulars issued independently of its rate schedules are not law-

fully in force; hence circulars prescribing the rules for maximum and minimum carload rates for grain are not binding and reparation will be ordered.

In re Alleged Unlawful Charges, 8 I. C. C. 585, it was held that published tariffs specifying the rates per standard crate of vegetables shipped from Florida should state plainly the weight or dimensions of the crate to which the weights apply. See also *J. R. Wheeler Co. v. Director General,* 59 I. C. C. 699.

Whatever may be the rule where unimportant regulations are involved, it is clear that a rule, the effect of which substantially affects the amount of freight charges paid, must be held to come within the statute requiring the filing of such a rule in the schedules. Certainly if the Department of Public Works has ruled that such a scaling rule must be filed, it is a ruling which is entitled to great weight, as an interpretation by the executive department charged with the administration of the statute. Especially is this view persuasive because it is supported by the rulings of the Interstate Commerce Commission under the I. C. C. relating to weighing for the purpose of computing freight charges. Weighing and scaling are analogous.

(3) A further answer to appellant's contention is

that there was no evidence nor any offer to show that the Northern Pacific's unfiled and unpublished scaling rule was also the rule of the Great Northern, Chicago, Milwaukee & St. Paul Railway and the Oregon-Washington Railroad. Tariff 51 being a joint tariff, it would be improper to permit the Northern Pacific to impose its scaling practices and thereby secure treatment preferential to that secured by the other carriers, there being but one and the same tariff applicable. Even, therefore, if an unfiled scaling rule is valid, it will be necessary under a joint tariff to show that the unfiled scaling rule was the same for all the carriers.

(4) In any event, if "board measure," as used in tariff 51, means "board measure commercial scale," unpublished scaling rules contrary to the tariff actually filed would, of course, be unenforcible.

9. Appellant next contends that the Long-Woodworth Agreement is a bar to the shipper's claim for reparation (App. Br. 212). We contend:

(1) There was no proof that the Long-Woodworth agreement provided for the Northern Pacific scale on which to base an estoppel.

(2) Even if it did, it would be voidable and subject to a subsequently filed tariff providing for the

commercial scale, and could not be the basis of an estoppel.

(1) The evidence showed that the Long-Woodworth agreement was an agreement between all the carriers and most of the shippers. It was not merely an agreement between the Northern Pacific and the Sauk River Lumber Company (Tr. 188, 189, 200). The same language was used in the agreement as was used in the tariff, namely, "board measure" (Def. Ex. "A." 25; Tr. 180). As Mr. Long testified (Tr. 200, 201):

> "The memorandum of agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling. There was to be no change. I think the theory of this was that the scaling method was settled and *uniformly* applicable to all the railroads." (Italics ours.)

He also testified:

> "The letters "B. M." on the memorandum agreement mean "board foot log scale." It is determined by scaling the logs. At no time during the conference do I recall any reference to the subject of scaling the logs . . . I do not know the way the Northern Pacific scaled at the time of this conference."

The evidence also showed that Mr. Long representing the loggers was employed by the Weyerhaeuser Timber Company, and that one of its subsidiaries was

at that time shipping over the Milwaukee Railroad (Tr. 279). The Milwaukee at that time was undoubtedly using the commercial scale in assessing freight charges on log shipment as was a justifiable inference from the evidence (Tr. 250, 261, 264, 265). He must have assumed in view of the fact that nothing was said about scaling practices and that he did not know of any Northern Pacific scale, that the commercial scale with which he was familiar would continue to be used and be the basis of refunds. Furthermore, as Mr. Frost testified, the Great Northern used the commercial scale for purposes of freight charges, and had been from 1920 on until tariff 51 was superseded (Tr. 261-264). This, of course, included the year 1926, the very period of time for which reparation was claimed here. Furthermore, as Mr. Irving testified (Tr. 279):

> "I attended the conference that led up to the Long-Woodworth agreement. I never authorized anyone to agree to a rate which would call for any other scale than the commercial scale. The Long-Woodworth agreement would have been unacceptable to me if any other scaling method than the commercial scale was to be used in connection with rates."

It is true, of course, that the refunds were on the basis of the carrier's scale, but apparently the other carriers who had used the commercial scale refunded on that basis; and the Northern Pacific, which un-

known to the Sauk River Lumber Company had not used the commercial scale, refunded on the basis of its scale. There would certainly have been no warrant in view of the evidence above set out for the court to have treated the Long-Woodworth agreement as constituting an agreement for the Northern Pacific scale to furnish the basis of an estoppel against a subsequently filed rate.

(2) Appellant next contends (on the assumption that the Northern Pacific scale was agreed to in the Long-Woodworth agreement), that the agreement is valid until set aside in a direct proceeding by the Department of Public Works and therefore constitutes a bar to this claim, assuming that the tariff means commercial scale. The cases cited clearly do not support this contention. No doubt the Long-Woodworth agreement was to this extent valid, that until a subsequently filed rate provided for terms other than that contained in the agreement, the agreement would be valid. Technically, it was a voidable agreement, subject to be voided by a subsequently filed tariff in accordance with the statutes of Washington. Even the authorities cited by appellant support this view of the law.

Thus, in *Armour Packing Co. v. United States,* 209 U. S. 56, 28 S. Ct. 428 (App. Br. 228), the court, in

holding that a prior contract with a carrier for a rate which was the legal published and filed rate when the contract was made, is no defense when the carrier has thereafter duly established a higher rate, since the statute it follows when the contract was made is read into the contract and becomes a part of it, and since the statute permits the filing of a rate thereafter by the carrier, the contract is ineffective to prevent it and its legal effect. The court said:

> "The contract, it is insisted, was at the legal published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate equally known by and available to every shipper . . . There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail in its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . . Nor do we find anything in the provisions of the statute inconsistent with this conclusion, in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

In *Seaman v. Minneapolis & R. R. Co.,* 149 N. W. (Minn.) 134, a carrier bought from a logging company a private logging railroad. As part of the consideration, the carrier agreed to transport the company's logs at a specified rate less than the tariff subsequently established. In holding the railroad not bound by the terms of the contract on the question of rates, the court said, p. 136:

> "The proposition that our rate legislation rendered these contracts inoperative we consider too clear to require further discussion or citation of authorities."

But appellant, while apparently recognizing this rule, suggests that the contract is not voided until held invalid in a direct proceeding before the Department, and that since no such proceeding has ever been brought, the contract is effective (App. Br. 240). In support of this position, he cites no case like that here involved arising under the laws of 1911. For example, cases cited dealing with telephone, water and power companies (App. Br. 236, 239), and the effect of the passage of the Public Service Commission Law of 1911 upon pre-existent contracts, is clearly inapplicable because Section 34 dealing with gas, electrical and water companies, and Section 43 dealing with telephone and telegraph companies specifically provide that the commission shall have power to direct by or-

der that existent contracts shall be terminated (Session Laws of '11, Ch. 117, pp. 561, 567). No such provision is found in the same act dealing with carriers.

The case of *Sultan R. & T. Co. v. Great Northern Railway Co.,* 58 Wash. 604 (cited App. Br. 233), was one in which the effect of the statutes of 1905 upon a pre-existent contract was involved. In holding that the contract was not abrogated by the passage of that statute, the court said, in distinguishing it from the *Armour Packing Co. v. United States* case (Br. p. 117), p. 619:

> "The contract was entered into before the passage of the Railway Commission Act and the amendments thereto, and there is nothing in the later acts tending to show that the legislature intended to abrogate previously existing valid contracts, conceding that it had the constitutional power to do so."

Furthermore, as recognized in *Northern Pacific Railway Co. v. St. Paul & Tacoma Lumber Co.,* 4 Fed. (2d) 359 (C. C. A. 9th) (cited App. br. 230-233), in refering to cases subsequent to the Sultan case, said:

> "If the cases cited are in conflict with *Sultan R. & T. Co. v. Great Northern Railway Co.,* 58 Wash. 604, the later decision must govern."

This statement was made in recognition of the rule that an existent freight contract must fall in the face of a subsequently filed freight tariff.

Furthermore, not a single case cited involves a reparation suit in which the Department of Public Works, having the pre-existent contract before it, has construed the tariff contrary to the claimed construction of the pre-existent contract. In this case, even assuming that a direct attack were necessary, it surely can be made in a reparation case. It would be useless to require a shipper to bring a proceeding for the purpose of directing cancellation of the contract and then bring a separate proceeding to recover reparation. There is nothing in the statutes of Washington which prevent both things being done in the same proceeding. That, in effect, was what was done by the Sauk River Lumber Company when it brought its reparation claim before the Department. The Long-Woodworth agreement was introduced in evidence before the Department and was the subject of a finding by the Department (Finding 14, Tr. 82). If the Department construed tariff 51 in a manner different from the Long-Woodworth agreement, the Department in effect held that the Long-Woodworth agreement was no longer binding.

The Long-Woodworth agreement being voidable, and having been voided either by the filing of tariff 51 or by the action of the Department as above mentioned, it is clear that no estoppel can be based upon

such an agreement. Having necessarily been made in view of the possibility that a subsequently filed rate tariff might render the rate provided for in the contract inoperative, there could be no justifiable reliance upon the contract as though it were not subject to change. That a void contract, under such circumstances, cannot be the basis of an estoppel seems clear. See *Melody v. Great Northern,* 127 N. W. (S. D.) 543. In that case a passenger accepted from a carrier's agent a ticket for interstate passage at a through rate, which under the rules of the Commission does not alllow stop-over privileges. The ticket did not show that stop-over privileges were not allowed. The passenger attempted to exercise the privilege and was ejected from the train. He brought suit, but it was held that he had no cause of action since persons dealing with interstate carriers are as effectually bound by the Interstate Commerce Act and the orders of the Commission as to both freight and passenger tariffs as the carrier itself. The court treated the contract under such circumstances as illegal and refused to apply the doctrine of estoppel against the carrier for the purpose of enforcing the contract. (See also Br. p. 103).

It is therefore submitted that there can be no

estoppel either under the undisputed facts or under the law.

What has been said should also dispose of contention (App. br. 240) that the Department's order of reparation violates the terms of the Long-Woodworth agreement, impairing the obligation of that contract. There is no evidence that the Departmental order construing the tariff as calling for a commercial scale construed it any differently than it would have construed the Long-Woodworth agreement itself under the evidence. Furthermore, since appellant itself concedes the right of the Department to abrogate the Long-Woodworth agreement in a direct proceeding, the contention must fail because that is in effect what the Department did at the hearing of the Sauk River Company's reparation claim.

The contention (App. br. 243), that if the Long-Woodworth agreement is invalid appellee is estopped to maintain the present action after receiving the refunds provided thereunder, overlooks the undisputed evidence that the question of scaling was not determined by the Long-Woodworth agreement, and that if determined at all, was more consistent with the determination in favor of the commercial scale than any other. Furthermore, the agreement was

voidable *not invalid* so that the estoppel principle cannot be invoked.

10. Appellant finally contends, (App. br. 247), that the findings are inadmissible and do not make a prima facie case so that the plaintiff's action must be dismissed.

This point has been discussed under assignment of error No. 4, and the argument there made is here applicable and need not be repeated. It should also be pointed out, however, that in addition to the findings, plaintiff introduced independent proof of all essential facts necessary to make out a cause of action (Tr. 235-287).

ANSWER TO No. 24.

(Tr. 121-122, 423; App. br. 125, 137)

Appellant objects to the refusal of the court to permit evidence of mill overrun as bearing on the meaning of tariff 51. Appellant claims that tariff 51 was not ambiguous. While it is difficult to see how this argument supports the assignment of error, the argument has heretofore been considered and need not be repeated. See Br. p. 78.

It may be well to recall that mill overrun results from the carrier's own Scribner Decimal "C" Scale,

and it cannot be a proper objection that it results from the shipper's use of the same scale. Furthermore, the law of the State of Washington as announced in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, holds that such evidence is immaterial. The law of the state on questions of the admissibility of evidence is controlling in a Federal Court under the Conformity Act. *Fisher Flour Mills v. United States,* 17 Fed. (2d) 232, (C. C. A. 9th).

ANSWER TO No. 25

(Tr. 136-143, 424; App. br. 159, 166, 181)

Appellant contends that its cost study showing the effect of freight charges under tariff 51 on the sufficiency of rates should have been admitted for the purpose of permitting a legal interpretation of tariff 51. Such evidence, it is argued, would have shown that the commercial scale would render the rates confiscatory and would have denied recovery to a shipper for excessive charges where the rates were less than reasonable. For answer to these contentions, see brief pages 91-93, 95, 97, 99, 104-109.

ANSWER TO No. 26.

(Tr. 170-172, 428; App. br. 192, 201)

Appellant contends the court erred in refusing to admit defendant's Exhibit "A" 22 for indentification, showing that the Department on January 28, 1929, dismissed on its own motion a complaint dated February 16, 1927, relating to the matter of scaling logs.

Despite the fact that this all occurred after the shipments in suit (1926), appellant contends that this evidence is admissible on the ground that unpublished scaling rules are binding, (App. br. 192), (For answer, see brief page 110), and need not be published under the administrative construction of the statute. (App. br. 200). For answer, see brief pages 110, 8, 88, 111, 127.

In any event, there is nothing in the mere fact of dismissal to prove administrative construction of anything. The Department might have thought that no rule as to scaling practices, commercial or otherwise, need be filed, because tariff 51 using the trade term "board measure" meant board measure commercial scale. Only the propriety of the highest conjecture would warrant the introduction of evidence so equivocal and so remote in character.

In any event, administrative construction cannot run contrary to the provisions of the statute requiring rules to be published. (R. R. S. 10350). Furthermore, if it is intended by introducing evidence of the administrative construction of the statute to alter the meaning of the term board measure, instead of applying the law of the state by interpeting that term in its commercial sense, it is now too late, since the law of the State of Washington governs and this evidence must be inadmissible.

ANSWER TO No. 27.

(Tr. 172-173, 429; App. br. 125)

Appellant contends that the court erred in refusing to admit in evidence the dictionary meaning of board measure. This is urged as erroneous on the ground that tariff 51 was not ambiguous. For answer, see brief page 78.

Furthermore, no evidence that the dictionary meaning had been used by the Northern Pacific itself nor by all the carrier parties to tariff 51 was offered. On the contrary, the evidence showed that the Northern Pacific made deductions for bark, burns, rotten sap, half the holes and breaks (Br. p. 4). The evidence later showed that other carrier parties to the tariff were not using the dictionary meaning.

Furthermore, the court and jury may take judicial notice of the common meaning of words without evidence. (23 C. J. 58, 124). The jury were especially advised of appellant's contention on this point in the court's instructions on the pleadings, wherein he said:

> The defendant " . . . alleges board measure in this case as a board 12 inches square and 1 inch thick, containing 144 cubic inches . . . "

Furthermore, board measure being a trade term, only a filed scaling rule showing a meaning other than its meaning commercially would have warranted the introduction of this evidence. (Br. p. 78).

Finally, the question is no longer open, in view of the law as announced in the Sauk River case.

ANSWER TO No. 28.

(Tr. 180-182, 430; App. br. 212, 216)

Appellant complains that the court improperly limited the purpose for which the jury could consider the Long-Woodwarth agreement as bearing on the meaning of board measure. Appellant contends the agreement is a bar in accordance with paragraph 12 of its answer. For answer to these contentions, see brief page 114.

In this connection, it should be pointed out that the court did not read paragraph 12 of the answer

to the jury, and appellant took no exception thereto. (Tr. 314, 325). Insofar as the Long-Woodworth agreement was offered in support of an issue not tendered to the jury and to which no exception was claimed, the point that the evidence was admissible under paragraph 12 has been waived.

ANSWER TO No. 29.

(Tr. 183-188, 431; App. br. 212)

Appellant contends that the court erred in refusing to admit evidence showing the history of litigation resulting in the Long-Woodworth agreement. Appellant contends that the evidence was material under its claim that that agreement is a bar to this action. For answer, see brief page 114.

Furthermore, the refusal to admit this evidence was not prejudicial, for substantially the same matter was later brought out in appellant's cross-examination of Mr. Berger (Tr. 271, line 7, to 272, line 2), and Mr. Woodworth (Tr. 183, 184 and Mr. Long, Tr. 200).

Furthermore, such evidence is immaterial as not proving the commercial meaning of board measure as the law of the state requires.

ANSWER TO No. 30.

(Tr. 192-194, 432; App. br. 137)

Appellant contends that Mr. Woodworth's testimony that the principle that the freight rate should be related to quantity or weight carried and that the commercial scale violates that principle should have been admitted. It is claimed that this evidence is admissible for the purpose of interpreting tariff 51 in a reasonable way. For answer, see brief page 19.

Furthermore:

(1). All the questions are leading.

(2). The interpretation of the tariff must be made in accordance with the law of the State of Washington, which adopts the commercial interpretation. The point urged is foreclosed except in a direct attack.

(3). No prejudicial error in any event occurs, for Mr. Woodworth was permitted to testify (Tr. 191):

> "The application of the commercial scale under tariff 51 would have resulted in further reducing the rates or reducing the freight paid from 5% to 10%. The greater the difference in the logs shipped the greater would have been the deduction in the railroad's compensation for the service."

Earlier he testified, (Tr. 191):

> "There would have been no settlement on behalf of the Northern Pacific had any such con-

tention been advanced at that time as is now advanced in this litigation to the effect that the commercial scale was applicable."

(4) The proposed evidence was with respect to appellant only, though the tariff was *joint.*

ANSWER TO No. 31.

(Tr. 194-196, 434; App. br. 181)

Appellant argues that the trial court erred in rejecting evidence as to the reasonableness of freight rates under tariff 51 (only so far as Northern Pacific is concerned) on the theory that unless shown unreasonable there can be no reparation even if the carrier charged freight in excess of the filed tariff. (App. br. 181). For answer, see brief page 104.

ANSWER TO No. 32.

(Tr. 196-197, 435; App. br. 172)

Appellant contends that the evidence that the Northern Pacific fixed its rate with reference to its own scaling methods should have been admitted. The assignment of errors is argued in support of its position that the Long-Woodworth agreement is a bar to this suit. (App. br. 172). For answer, see brief page 114. Furthermore, there is no showing or offer to show that all the carriers fixed the rate in the

Long-Woodworth agreement or tariff 51 with reference to the Northern Pacific scaling method. One carrier cannot secure a special interpretation applicable to itself of a joint tariff different from the interpretation applicable to the other carriers.

Furthermore, insofar as this evidence has to do with interpretation, the law of the Supreme Court of Washington that the term "board measure" should be construed in its commercial sense is binding.

ANSWER TO No. 33.

(Tr. 199, 436; App. br. 212, 216)

Appellant contends the court erred in limiting the purpose for which evidence was admitted of refunds made under the Long-Woodworth agreement. Appellant argues that this evidence was admissible in support of the estoppel and counter-claim pleaded in paragraph 12 of its answer. (App. br. 212). For answer to the estoppel contention, see brief page 114.

Evidence in support of the counter-claim as well as the counter-claim itself, was properly rejected. This is a law action, and if appellant contends in this action that it is entitled to judgment against the Sauk River Lumber Company for the amount of refunds made pursuant to the Long-Woodworth agreement,

that contention must rest either (a), upon the theory of rescission or damages for breach of contract; or, (b), imposition of equitable conditions by a court of equity as a condition of granting relief.

Relief by rescission is not available, however, first, because there is no ground therefor. The only basis for the claimed rescission would be that the Sauk River Lumber Company has breached the Long-Woodworth agreement by suing to recover overcharges under tariff 51. But there is no breach, first, because there is no evidence that the Sauk River Lumber Company ever agreed to abide by the Northern Pacific scaling rules. The evidence is to the effect that there would have been no agreement had anything but the commercial scaling rules been accepted. (See brief page 8). Secondly, relief by rescission is no longed available because there has been full performance of the obligation of the parties thereunder on each side. *Cowley v. Northern Pacific Railway Co.,* 68 Wash. 558, holding that where a contract for annual passes in consideration of conveyance of property has become void by reason of the Commerce Act of 1887, and the contract has been substantially performed and the property is greatly increased in value, a court of equity will not decree a rescission

and restitution of the property, rescission resting upon discretion and not absolute right.

In *Southern Pacific R. Co. v. Frye & Bruhn,* 82 Wash. 9, there was involved an agreement between shipper and carrier to protect a freight rate. The carrier refunded to the shipper the sum in excess of the agreement required by the tariff. In holding that the carrier could not recover back the amount so paid, the court said, respecting the carrier's authorities:

> "We have examined with some care all the authorties cited by the appellant. They are to the effect that any shipping contract deviating from the legally published rate is void and cannot be made the basis of a defense in a suit to collect the legal rate. None of them holds that a party who has voluntarily paid money in the performance of such a contract can recover it after the contract has been fully executed by performance on both sides. Some of them clearly imply the contrary. . . "
>
> " . . . If we are precluded from passing upon the meaning of the appellant's published tariff, but must accept as final appellant's claim that the contract was illegal, then we hold that the contract having been fully executed, there can be no recovery for the money voluntarily paid by appellant thereunder."

Possibly appellant may claim that it is asking for damages for breach of contract rather than rescission, but there can be no breach of a contract not absolute in its terms, but subject to a condition subsequent,

namely, that its terms must yield to the provisions of a subsequently filed and different rate tariff. There is no breach to assert what the contract permits. The shipper is but asserting his right to the published tariff. To compel the shipper under such circumstances to pay a sum of money for the purpose of asserting the right given to him by statute is to permit the carrier to retain the consideration it received at the time of the agreement, and to recover back part of the consideration for the agreement as well.

Nor can this alleged counter-claim be treated as a method of permitting relief subject to the imposition of equitable conditions. There is no ground for equitable relief, and if that be true, a court of equity cannot on the one hand decline to take jurisdiction and at the same time impose equitable conditions, thereby exercising the same.

In *Blue Point Oyster Co. v. Haagenson,* 209 Fed. 278, Judge Cushman, in an action for specific performance, said, page 283:

> "Upon the hearing, the court was asked by complainant in the event that it should find that the complainant was not entitled to specific performance, to assess its damages. This will not be done, for to do so, after the conclusion reached, would be to refuse jurisdiction in equity and exercise it in the same case."

Certainly no authorities are cited by appellant in support of the position that it is entitled to a judgment for the refunds made. We believe that if the evidence of refunds was admissible at all, it was admissible only on the questions permitted by the court, namely, on the meaning of board measure, (since appellant claims that it made refunds on the basis of the Northern Pacific scale).

ANSWER TO No. 34.

(Tr. 201-206, 437; App. br. 146, 154, 192, 200, 218)

Appellant contends that the court erred in refusing to permit Mr. Cleveland to testify to the contents of all tariffs filed before tariff 29. It was contended that the contents of the preceding Northern Pacific tariffs would prove practical construction of the Washington statutes showing that scaling rules need not be filed and that the Northern Pacific scaling rule was proper (App. Br. 146). For answer, see Br. pages 22, 110).

This evidence is immaterial because it doesn't prove what the commercial meaning of board measure is.

It should also be pointed out that tariff 51 was in effect only since 1925 (Tr. 212). The court had permitted the appellant to prove that after its tariff 398L was attacked, it and other carriers had filed joint tariff 29 in 1922, which was immediately sus-

pended. The history of the matter in connection with this was testified to by Mr. Berger (Tr. 271) and by Mr. Cleveland (Tr. 206). The next tariff filed was tariff 51. There was no attempt to prove nor any offer to show administrative construction of any but the Northern Pacific tariffs prior to tariff 29, but such a special administrative construction applicable to one of four carriers filing a joint tariff would as has previously been shown, been inadmissible. (See Br. pp. 99, 110).

In addition to the matters heretofore argued, it should be pointed out that tariffs prior to 1911 would certainly have been inadmissible for the reason that the statutes at that time were different from the Public Service Commission law passed in 1911.

Appellant argues this assignment also under the heading that an unpublished scaling rule is binding, (App. Br. 192), (For answer, see Br. pages 22, 110), and that scaling rules need not be published under administrative construction of the statute. (For answer see Br. page 22).

ANSWER TO No. 35.

(Tr. 210-212, 440; App. Br. 212, 216)

Appellant contends that the court erred in limiting the purpose of receiving tariff 29 solely as an aid to

construing the meaning of the term "Board measure." It is claimed that it was admissible on the issue of estoppel by the Long-Woodworth agreement or counter-claim. (App. br. 212). For answer see br. page 114, 132.

Furthermore, insofar as estoppel and counter-claim is concerned, there is nothing in the court's instruction limiting the use of the evidence concerning tariff 29 to the construction of board measure in tariff 51. The jury might, under the terms of the court's instruction, have used tariff 29 for the purpose of determining the meaning of "board measure" in the Long-Woodworth agreement, in aid of the defendant's theory as to estoppel and counter-claim. In that respect too, the assignment is not well taken.

ANSWER TO No. 36.

(Tr. 215-220, 440; App. br. 336)

Appellant contends that the court erred in refusing to admit defendant's Exhibit "A" 29, being findings and order and tariff dated June 5, 1934, May 15, 1934, and January 25, 1935, dealing with the hauling of logs on "for hire carriers" as distinguished from railway carriers. It is claimed that the exhibit should have been received as evidence as the departmental con-

struction of the term "board measure". (App. br. 336).

The evidence was clearly inadmissible:

1. The question of construction, other than in the commercial sense, is no longer an open question in this case.

2. The findings are hearsay, since this exhibit is not the basis of a suit to recover reparation allowed.

3. The tariffs do not relate to railroad carriers.

4. The so-called construction does not relate to tariff 51.

5. The Exhibits do not use the term "board measure".

6. The Exhibits were promulgated nearly ten years after tariff 51 went into effect, and there was no offer to show that conditions remained the same so as to make a so-called departmental construction under the same conditions applicable to tariff 51.

ANSWER TO No. 37.

(Tr. 220-223, 446; App. br. 159, 167, 181)

Appellant contends that the findings and order dated June 5, 1931, setting aside rates on saw logs for measurement should have been admitted. It is claimed

that this evidence was necessary as bearing on the legal interpretation of tariff 51 (App. br. 159, For answer see br. 20); as bearing on the confiscatory character of the department's interpretation (App. br. 166, for answer, see br. 20) and as showing the unreasonable character of rates under tariff 51 for the purpose of precluding an overcharge claim (App. br. 181, for answer see br. page 21). The evidence was also inadmissible:

1. The Exhibit contains hearsay statements.

2. It does not relate to the year 1926, or to tariff 51.

3. It relates to the year 1931. Whether car load rates in 1931 were reasonable or unreasonable is certainly no evidence of reasonableness of the board measure rates in 1926.

ANSWER TO No. 38.

(Tr. 223-227, 449; App. br. 159, 166, 181)

Appellant contends that the court erred in refusing to admit defendant's Exhibit "A" 16, being a study of comparative earnings on log traffic and on eight other commodities moving in volume in western Washington. It is claimed that this evidence was admissible for the purpose of showing that the Department's construction of the tariff is illegal (App. br. 159. For

answer, see brief page 20), confiscatory, (App. br. 166, For answer, see brief page 20), and for the purpose of showing that shipper was not damaged because the rates were not unreasonable. (App. br. 181. For answer, see brief 21).

As has been pointed out, the question of the sufficiency of rates is immaterial in this proceeding. Furthermore, the evidence was not coupled with an offer to show similar data as applicable to the other carrier parties to tariff 51. Nor does it prove the commercial meaning of board measure.

ANEWER TO No. 39.

(Tr. 227-229, 453; App. br. 181)

Appellant contends that the court erred in refusing to permit Mr. Cleveland to testify that the rates collected were less than reasonable in support of its position that unless it is shown that the rates charged were unreasonable, reparation cannot be recovered. (App. br. 181. For answer, see brief page 21).

Furthermore, this offer was not coupled with an offer to show the same matters as to the other carrier parties to tariff 51. Nor does it prove the commercial meaning of board measure.

ANSWER TO No. 40.

(Tr. 234, 287-288, 454; App. br. 212, 216, 347)

Appellant contends that the court erred in striking the counter-claim and plea of estoppel, (Par. 12 of answer), and rejecting all evidence in support thereof. (App. br. 212, 216, 347. For answer, see brief 24).

It should be again pointed out that the only thing stricken prior to the court's instruction was the counter-claim, and to that an exception was saved, (Tr. 234); but on the question of estoppel, paragraph 12 of the answer was not submitted as an issue to the jury in the court's statement of the issues, but no exception was saved to the action of the court in not doing so. In another assignment of errors, to the refusal of the court to give a proffered instruction dealing with estoppel, an exception was saved, and that matter will be argued when we come to that assignment. No evidence in support of a claimed estoppel was rejected. On the contrary, the evidence was all admitted, limited it is true, however, to use for the purpose of determining board measure. That matter has already been considered. (See answer to assignment of error 33).

Appellant states (App. br. 348), that Judge Neterer decided that the defense of estoppel and counter-

claim was good, because Judge Neterer overruled appellee's motion to strike paragraph 12 from the answer. (Tr. 57). The ground of the court's refusal does not appear. The motion was argued by former counsel in this case. What the nature of the argument was or what the reason for the court's action was we do not know, nor does it appear from the record. We are, therefore, not disposed to accept appellant's interpretation of Judge Neterer's ruling.

ANSWER TO No. 41

(Tr. 250-262, 454; App. br. 301)

No. 42

(Tr. 260-261, 455; App. br. 302)

No. 43

(Tr. 262, 456; App. br. 301)

No. 44

(Tr. 265, 457; App. br. 301)

No. 45

(Tr. 284-285, 457; App. br. 301)

No. 47

(Tr. 280-281, 458; App. br. 309)

No. 50

(Tr. 291-295, 298-301, 462; App. br. 302)

No. 52
(Tr. 303-307, 468; App. br. 303)

No. 118
(Tr. 374-375, 531; App. br. 304)

The foregoing assignments present one question, namely: Whether the court committed error in permitting the introduction of evidence to the effect that the Great Northern and the Chicago, Milwaukee railways parties to tariff 51 used the commercial method of scaling before and after the Long-Woodworth agreement and tariff 51.

Appellant argues that evidence of scaling practices was remote and immaterial because different tariffs were involved. It will be recalled that plaintiff's case in chief consisted of findings and order of the Department, testimony as to reasonableness of attorneys fees, and testimony as to the dates when freight charges were paid. The appellant's answering case consisted of voluminous testimony, purporting to rebut plaintiff's case. Among other things, the appellant introduced the Long-Woodworth agreement and evidence of the negotiations out of which it emerged. It offered the testimony both of Mr. Long and Mr. Woodworth. Appellant also introduced evidence of its scaling practices since 1906. (Tr. 108, 120, 162,

163). Among other things Mr. Long testified concerning the Long-Woodworth Agreement (Tr. 200, 201):

> "The memorandum of agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling. There was to be no change. I think the theory of this was that the scaling method was settled and uniformly applicable to all the railroads."

Appellee in rebuttal sought to explain what Mr. Long meant by his testimony concerning the practice of the shippers in the past "in the way of scaling," and as to scaling methods that "was settled and uniformly applicable to all the railroads." Mr. Frost's and Mr. Barrett's testimony showed the past log scaling practices of the Chicago, Milwaukee and Great Northern in the Puget Sound region just as the Northern Pacific had been permitted to testify to the scaling practices of the Northen Pacific in the Puget Sound region in the past. It will also be remembered that the Milwaukee and Great Northern and the Northern Pacific were all parties to the Long-Woodworth agreement and to tariffs 29 and 51. The trial court rightly ruled, therefore, that the scaling practices of these other carriers were properly considered in view of Mr. Long's testimony introduced by appellant itself. (Tr. 260). Obviously the practices of the other carriers under tariff 51 and their understanding of

what board measure meant in the Long-Woodworth agreement, would, even on appellant's own theory of the conduct and understanding of the parties as bearing upon the interpretation of an ambiguous term have been clearly material. Furthermore such testimony rebutted the appellant's evidence and inference from evidence of uniform practical construction and the claimed unambiguous meaning of board measure. That rebuttal testimony is largely in the discretion of the trial court reviewable only for abuse of such discretion, see *Kelley v. Department of Labor & Industries,* 172 Wash. 525, 529. Here the discretion was properly exercised.

Appellant contends, however, that the testimony was immaterial because the scaling methods of the Great Northern and Milwaukee railways were methods used under different tariffs than those filed by the Northern Pacific. It cites authorities to the effect that every railway may set up its individual tariff on any basis it chooses, even though its competitors use a different basis (App. br. 306), overlooking the fact that there is here involved a joint tariff meaning the same for all carriers. But in any event, the question whether the scaling practices of the Milwaukee and Great Northern, were warranted by their respective tariffs, was not the question. Mr. Long did not testify

that the *warranted* scaling practices were to continue. He testified that the scaling practices were to continue and that he thought them uniformly applicable to all railroads.

But if there was any prejudice in showing the shippers' practices as distinguished from the shippers' warranted past practices, appellant was accorded full opportunity to explain or to contradict such evidence or evidence as to the scaling practices of the other carrier parties to the tariff or to the agreement, both by offering in evidence the tariffs of those carriers and by offering testimony as to their scaling practices. The court reminded the appellant (Tr. 257, 258), after explaining his reasons for permitting appellee to introduce evidence of the scaling practices of the other carriers: "For that reason the court feels that this offered testimony is proper rebuttal testimony, and the court again advises both parties that a reasonable opportunity will be given the defendant to produce surrebuttal within a reasonable scope on that point." He had earlier stated (Tr. 254): "A reasonable opportunity will be given the defendant to put on rebuttal touching this point." He again reminded appellant (Tr. 285): " . . and the defendant is again advised that surrebuttal within reasonable scope on that question objected to in respect to the

testimony of those witnesses may be produced by the defendant,''—referring to Mr. Barrett's and Mr. Frost's testimony.

Appellant, however, failed to introduce any evidence or testimony, either to explain or to contradict that of Mr. Frost and Mr. Barrett.

Its failure so to do especially emphasized the fact that the testimony of the Milwaukee scaling practices from 1913 to 1919, and 1920 to 1922, could scarcely be said to be remote, especially when the Northern Pacific testimony as to scaling practices went back to 1906. Appellee had the right to rely upon the presumption that the Milwaukee scaling practices continued, a presumption that the appellant could easily have overcome if the facts were contrary. Especially was that tesimony proper when it was coupled up with evidence that the Great Northern scaling practices according to the commercial method was the same before the Long-Woodworth agreement as after it and after tariff 51 was filed.

But one assignment of error needs an additional observation. Appellant's assignment of error 118 is based upon the refusal of the court to adopt appellant's proposed instruction to the effect that the Northern Pacific wasn't bound by the scaling prac-

tices of the other carriers. Such an instruction without an indication that the Northern Pacific might be affected as bearing upon the meaning of the term "board measure" was clearly erroneous and misleading. The most that appellant would be entitled to and that appellant received was the following instruction given by the court to the jury (Tr. 261):

> "The jury will understand that the mere fact that some other railroad may have used a different method, may not of itself conclusively prove that the Northern Pacific is liable for damages in this case, but the jury will receive this evidence only for the limited purpose that the court stated it could receive it for, namely, in connection with the question, what is the proper method of board measure, and what was the proper method of scaling logs for the purposes involved in this suit."

It is submitted that none of the foregoing assignments of error are well taken.

ANSWER TO No. 46

(Tr. 274, 458; App. br. 201)

Appellant contends that a question asked Mr. Berger on cross examination as to what happened to the suit of the Department against the carriers in 1920 should have been permitted for the purpose of securing an answer in aid of the proposition that scaling rules need not be published under the administrative

construction of the Washington statute. (For answer see brief page 22).

Furthermore, it should be pointed out:

1. An answer to that question would not necessarily prove administrative construction.

2. Evidence had already been introduced as to what happened, namely the reversal of the department's action by the Supreme Court of the United States.

3. There was no offer to show what the answer to the question would be so that the objection is not properly saved.

ANSWER TO No. 48

(Tr. 281-282, 458; App. br. 349)

Appellant contends that the court erred in permitting Mr. Irving to testify on direct examination whether the same facts were developed before the Department as had been developed at the trial. (App. br. 349). It is claimed (without citation of authority) that the question asked of him called for an inadmissible conclusion. (App. br. 349).

The only case we have found bearing on the question holds to the contrary. *State v. Maxwell,* 1 N. W. (Iowa) 666. In that case defendant was charged with assault and battery. He pleaded not guilty, and former

conviction for the same offense. The state introduced evidence tending to prove the crime charged. The defendant offered as a witness a Justice of the Peace, whose docket was admitted tending to show former conviction for the same offense. The information filed before the Justice of the Peace was also admitted. The defendant then asked the witness "whether the offense which is charged in that information is the same one that has been testified here today by these witnesses?" and also "whether or not the evidence was the same". The trial court sustained objections to these questions. The Supreme Court, in reversing the case for the action of the trial court in this respect, said:

> "The object of the proposed evidence was to show the identity of the two offenses, and it should have been admitted.
>
> "The Attorney General insists that the mere opinion of the witness was sought, and that what the witnesses testified to before the justice was immaterial, or rather incompetent. But we think if the witnesses were the same, and they described a certain transaction, any one who heard them on both occasions could properly state such facts. Such evidence would tend to prove the identity of the two offenses. It was not admissible for any other purpose. Properly speaking, it was not an opinion the witness was asked to communicate, but a fact that occurred in his presence."

This case is but an application of the general rule stated in 22 C. J. 531:

> "The rule . . . is that where numerous impressions of a more primary order are blended into a composite fact of more complex but still inevitably recognizable nature, and it is practically impossible to reproduce or adequately describe to the jury the primary facts on which the witness' inference as to the existence of the ultimate fact is based, the ultimate fact may be stated."

22 C. J. 597:

> "A witness who is shown to be possessed of adequate knowledge and the capacity to apply it, may state his inference on a question of identity, whether the inquiry relates to the identity of human beings, of animals, of inanimate things, or even of occurrences."

In this case the witness was thoroughly cross examined (Tr. 282). The appellant had shown in its case in chief what the pleadings were before the Department. (Pl. Ex. A20, A21; Tr. 164, 167).

Appellant, though it did not choose to, could have offered in evidence the record before the Department to contradict the testimony of Mr. Irving. The appellant did, however, offer in evidence a list of witnesses, (Pl. Ex. A22; Tr. 285) that testified before the Department, from which the jury could determine whether the witnesses and the evidence were the same. Furthermore, the court instructed the jury that it

need not believe the findings in face of contrary credible evidence in the case, stating, (Tr. 318):

> "In considering the findings of the Department, you have a right to consider the fact, if it be a fact, that new or additional evidence has been introduced before you which was not before the Department."

Under all these circumstances, the question of the admission in evidence of Mr. Irving's answer to the question was largely within the discretion of the trial court reviewable only for abuse (See 22 C. J. 514; *State v. Bolen,* 142 Wash. 653, 664). It is submitted that there was no abuse of discretion and that the question was proper.

ANSWER TO No. 49

(Tr. 290-291, 296-301, 459; App. br. 322)

Appellant contends that the court erred in denying defendant's motion that the jury be instructed to disregard the opening argument of counsel for plaintiff concerning the decision of the Supreme Court of Washington. Appellant contends that the decision was not in evidence before the jury, and should not have been considered by them for any purpose. (App. br. 327). We contend:

1. That the action of the Supreme Court in affirming the award was before the jury.

2. It was perfectly proper to refer to the action of the Supreme Court in affirming the Departmental findings and order as an argument in favor of appellee's contention that the jury should decide for the plaintiff.

3. The error, if any, was harmless.

1. The fact that the Supreme Court had reversed the action of the Superior Court and reinstated the findings and the order of the Department was before the jury. Plaintiff instituted suit while the Superior Court had set aside the findings and order of the Department and an appeal was pending before the Supreme Court of Washington. In its supplemental complaint, appellee pleaded the action of the Supreme Court in paragraphs 7 and 8 of the complaint. (Tr. 44, 45). Appellant, in paragraph 6 of its answer to the complaint (Tr. 24), and in its answer to the supplemental complaint (Tr. 54) admitted the whole of paragraph 8 of the supplemental complaint. That paragraph reads as follows:

> "That thereafter this plaintiff and the said Department, not being satisfied with the judgment in said review proceedings and being aggrieved thereby, appealed from the judgment of said Superior Court to the Supreme Court of the State of Washington; upon the hearing of said appeal upon the merits, said Supreme Court reversed the judgment appealed from and re-

> manded said case to the said Superior Court with direction to enter judgment sustaining the said order of the Department. A copy of said decision of the Supreme Court is attached hereto, marked Exhibit "B" and by this reference made a part hereof. That thereafter said Superior Court, pursuant to the direction aforesaid, made and entered a judgment upon remittitur herein, a copy of which judgment, save the decision of the Supreme Court (attached to this pleading as Exhibit "B") is attached hereto, marked Exhibit "C" and by this reference made a part hereof."

The appellee had a right to rely on matters admitted in the pleadings without further proof of the same. (62 C. J. 112). Indeed, the exclusion of competent evidence to prove an admitted fact would not have been erroneous.

> *Schwede v. Hemrich,* 29 Wash. 124;
> *Johnson v. Anderson,* 61 Wash. 100.

Accordingly, appellee made no effort to introduce the decision in support of its complaint or in its rebuttal testimony, except that, out of a superabundance of caution, it offered a copy of the decision in evidence not in support of its complaint but in support only of the matters pleaded in its affirmative reply. This was done in the absence of the jury. It will be remembered that under the pleading and practice of Washington, there is no pleading beyond the reply, and all affirmative matters in the reply

are deemed denied. (R. R. S. 297). This view of the matter clearly appears from the bill of exceptions (Tr. 286), which states:

> "THE COURT: (in absence of jury). The admission of plaintiff's Exhibit 22 is denied, it *being understood that the Supreme Court's affirmance of the Department's findings is not disputed as to the matter of fact admitted in the pleadings,* which makes it unnecessary to admit it for any purpose connected with that matter, (*referring to affirmative reply*)." (Italics ours).

That the trial court understood the fact of affirmance of the Departmental findings and order to be before the jury in the form of a fact admitted by the pleadings is indicated not alone by the court's refusal to instruct the jury to disregard reference by appellee's counsel to the action of the Supreme Court, (the same ground therefore being urged below), but also because the court's instructions to the jury on the pleadings called attention to the fact that the action of the Supreme Court was admitted by appellant. (Tr. 313, 314).

Appellant made no motion to strike such admission from the pleadings, nor did appellant take any exception to the action of the trial court in calling the jury's attention to the admission in appellant's answer of the facts alleged concerning the decision of the Supreme Court of Washington. Appellant's state-

ment, therefore, (page 321), that the decision of the Supreme Court, although offered by appellee, was not admitted in evidence, is clearly misleading.

2. Reference to the effect of the Supreme Court's decision.

Appellant argues that because the merits of plaintiff's claim were not decided by the Supreme Court of Washington, that therefore it was improper to refer to that decision at all in argument to the jury. (App. br. 320, 326).

We have elsewhere pointed out (Br. 17, 23, 60), that the effect of the Supreme Court's action in reinstating the findings and award was a judicial holding that the evidence and record before the department warranted the department in making the findngs and order that it did. That being the legal effect of the decision, it was entirely proper for appellee's counsel to call attention to the action of the Supreme Court, as persuasive evidence that appellee's interpretation of the tariff and the correctness of the findings was right. Nowhere was it argued that the jury should deem itself to be concluded by that action. It was argued merely that they should be persuaded by that action. Even if it could be inferred from the argument that the jury would have to deem themselves concluded by

that action, the court's instructions following argument of counsel for both sides clearly dissipated any such inference. The court instructed on the question of burden of proof. The court instructed on the question of the findings and order of the Department as prima facie evidence of the facts therein stated. The court instructed upon what effect to give to new or additional evidence, and the court specifically instructed (Tr. 317):

> "You will note that it is 'the facts therein stated,' *not the liability of the defendant* of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor statements, comments, or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. Yo are not to consider anything contained in those findings and order except the facts therein stated. It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instructions." (Italics ours).

It was not incumbent on the trial court to correct the error, if any, in the argument of counsel by motion to instruct the jury to disregard portions thereof. The court, in the exercise of its discretion, might well have awaited the time to instruct the jury properly when it gave its instructions to the jury.

It is to be remembered, as stated in 64 C. J. 267, "counsel should not be subjected to unreasonable restraint in commenting on evidence, but should be allowed a wide latitude, this being a matter for the sound discretion of the trial judge. Thus as a general proposition he may discuss such facts as are in evidence without limit or restriction, but he may not urge the jury to predicate their verdict on what they know outside of the evidence."

In 64 C. J. 249, it is stated:

> "Counsel has great latitude in argument, subject, however, to the regulation of, and control by, the court, whose duty it is to confine arguments within proper bounds. However, the logical propriety of counsel's argument is not a matter for the court's concern. Thus counsel may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence . . . Mere exaggeration is not necessarily improper, and if the evidence warrants it, he may make vituperative remarks and use inflammatory language."

There is certainly no abuse of discretion in this case.

3. No legal prejudice.

As has heretofore been pointed out, the action of the Supreme Court in announcing the law of Washington to the effect that an ambiguous term in a tariff

must be construed in its commercial sense is binding upon the trial court. Even, therefore, if it can be said that counsel argued the binding character of the decision of the Supreme Court of Washington, or argued any other legal proposition that was correct in fact, no prejudicial error could be claimed on that account.

In *Gallagher v. Town of Buckley,* 31 Wash. 380, it was held that the fact that plaintiff's counsel in a personal injury case read to the jury an opinion of the Supreme Court in a similar case will not be regarded as prejudicial error when the opinion read was in accord with the law as given by the court to the jury, and when there is nothing to show that the jury may have been misled or the defendant in any way prejudiced thereby. As the court said:

> p. 386. "The jury were carefully instructed that they must look alone to the evidence in this case as the basis of any verdict they should find. We shall presume they did so, under the record."

It is respectfully submitted that the authorities cited in appellant's brief 327 to 330 are not in point because of the court's instructions, and that the assignment as a whole is not well taken.

ANSWER TO No. 51

(Tr. 301-303, 305-307, 466; App. br. 322)

Appellant contends that the court erred in denying its motion to instruct the jury to disregard the opening argument of counsel commenting on the scaling practices of other carriers (Tr. 462). The comment was strictly according to the testimony of Mr. Frost and Mr. Barrett admitted in evidence, and was directed to what was meant by board measure under the Long-Woodworth agreement and tariff 51, and the significance of appellant's failure to introduce rebutting testimony as to carriers' practices. As to the latter point the rule is stated, 64 C. J. 269:

> "But he may comment on the absence of evidence which is in the possession of the opposite party which should naturally be introduced; . . "

It was clearly proper for appellee's counsel to point out the absurdity of appellant's position that board measure should mean Northern Pacific scale for the Northern Pacific, while the other carriers construed it to mean commercial scale, all carriers being parties to the same agreement and tariff. This point need not be discussed further. (See brief page 23).

Furthermore, since the rule that an ambiguous term in a tariff should be construed in its commercial sense is the law of the State of Washington, and since

this objection is based on the proposition that the commercial scale is not the proper method of interpretation, this claimed error is not prejudicial.

ANSWER TO No. 53

(Tr. 317-318, 325-326, 471; App. br. 256, 313)

Appellant contends that the court's instructions on the meaning of prima facie evidence were improper since the court permitted the findings and order to be weighed by the jury as evidence. It is appellant's position that the findings and order amount to nothing more than a presumption of law operating to shift the burden of going forward with the evidence and depriving the findings of all efficacy after credible rebutting evidence has been introduced. We contend:

1. That the findngs may be weighed as evidence under the limitations placed upon them by the court.

2. That even if they may not be, there was no prejudicial error, since the instructions do not necessarily mean that the findings may be weighed even as against opposing credible evidence.

1. Apellant seeks to give the findings and order no greater force than a common law presumption of law. Such presumptions do not, of course, arise as a result of findings subject to judicial review after a

hearing had. Such presumptions rest on common experience and inherent probability. Such presumptions are, for example, the presumption of sanity, the presumption of due care, the presumption against suicide, the presumption of ownership resulting from possession, and presumptions of that character. It is true that such common law presumptions, according to many decisions, may not be weighed as evidence in the face of credible evidence admitted to rebut such presumptions. The rule of cases of that kind is the rule relied on by apellant. But even as to such common law presumptions, there are authorities to the effect that such presumptions prevail unless rebutted by credible evidence. Whether the presumption of due care or sanity or ownership is to be believed by the jury as a proper inference of fact is determined by the quality of the testimony offered to rebut it. If the jury does not choose to believe that testimony, it will treat the presumption as the fact.

Karp v. Herder, 81 Wash. Dec. 511;

Mutual Life Insurance Co. v. Maddox, 128 So. (Ala.) 383;

New York Life Insurance Co. v. Beason, 155 So. (Ala.) 530;

Eisenman v. Austen, 169 Atl. (Me.) 162;

Maxey v. Railey & Bros. Banking Co., 57 S. W. (2d) (Mo.) 1091.

In California common law presumptions may be weighed against rebutting testimony because the statute so directs.

Pitt v. Southern Pacific Co., 9 Pac. (2d) 273.

In fact, the statute treats such presumptions as inferences of fact, (i. e. presumptions of fact) to be weighed along with other facts by the jury.

Bushnell v. Yoshika Tashiro, 2 Pac. (2d) 550.

In *Karp v. Herder,* supra, plaintiff brought an action for wrongful death, the plaintiff pleading contributory negligence. The court instructed the jury, among other things, that it was the deceased's duty to yield the right of way to defendant, and then added:

> "The law presumes that at the time and place in question, and at this intersection, the deceased did yield the right of way to the defendant. This, however, is merely a presumption and may be overcome by the evidence in this case to the contrary if there is such evidence, but it continues as a presumption until it has been overcome by the evidence in the case."

It was contended that this instruction was erroneous because there had been positive testimony to the effect that the deceased did not yield the right of way to the defendant. The court recognized that,—

> "In many jurisdictions the presumtion of due care on the part of a deceased person falls and

> loses its force completely upon the introduction of positive evidence to the contrary."

The court also recognized that,—

> "Language may be found in many of our own cases from which it might be inferred that such is the rule in this jurisdiction. . . ."

The court then called attention to the rule in other jurisdictions that the presumption may be strong enough to overcome the testimony of a witness, (i. e., that it may be weighed against such testimony), and then held from a consideration of other cases in this jurisdiction, that the instruction was proper and that it was for the jury to determine whether to give effect to the presumption or to believe the rebutting testimony.

Also we are not dealing here with a common law presumption, we are dealing with the statute that makes the findings and order of the department "prima facie evidence of the facts therein stated". It may be true that for purposes of determining whether such a rule deprives a party of a right to jury trial or constitutes due process, it constitutes in effect a rebuttal presumption (whether of law or fact is not stated). Indeed, that is all that the cases cited by appellant hold. (e. g. Appellant's brief 272, 273). But no case cited by appellant purports to state

that the findings and order of the commission under the I. C. C. must be given the same effect as the common law presumption of law which may not be weighed as evidence. On the contrary, the very fact that the Washington statute states that the findings and order shall be prima facie evidence of the facts stated as distinguished from a statement that the findings and order shall constitute a presumption that the defendant is liable in the amount awarded, may well indicate a purpose to treat such findings and order different from the treatment of an ordinary presumption of law.

The distinction between common law and statutory presumption is clearly pointed out in *O'Dea v. Amodeo,* 170 Atl. (Conn.) 486. The statute there provided that "proof that the operator of a motor vehicle was the husband, wife, father, mother, son, or daughter of the owner shall raise a presumption that such motor vehicle was being operated as a family car within the scope of a general authority from the owner, and shall impose upon the defendant the burden of rebutting such presumption."

In an action for personal injuries involving this statute, the court said:

> "The contention of the defendant . . . is that the effect of this statute is merely to carry the

case to the jury and justifies a conclusion that an automobile is a family car when no substantial evidence is offered by the defendant that it was not, but that, as soon as substantial evidence to that effect is offered, the statute ceases to have any effect and the plaintiff then has the burden of proving that the car was a family car just as though no statute existed."

The court then considered the various common law presumptions, and then said:

p. 488. "A presumption established by statute may fall into one or the other of these categories, or the language used may clearly indicate the effect which it is intended to have. . . "

"Our question is: What did the legislature intend by this provision? If in this instance the intent of the legislature was to do no more than to establish a presumption which would be rebutted by the producton of substantial countervailing evidence, the last provision in the statute would serve no purpose, and we must assume that by its inclusion the legislature intended some further effect. . . "

"To construe the statute as meaning that the presumption would be rebutted as soon as substantial countervailing evidence was offered would necessarily mean that, when the defendant had offered such evidence, the presumption would not only cease to operate; but the burden of proof would be upon the plaintiff unaided by inferences from the facts which gave rise to the presumption, and in the absence of sufficient evidence to sustain that burden the defendant must prevail, even though the trier entirely disbelieved the testimony offered by the defendant. . ."

"We conclude that the intent of the statute is

> that the presumption shall avail the plaintiff until such time as the trier finds proven the circumstances of the situation with reference to the use made of the car and the authority of the person operating it to drive it, leaving the burden then upon the plantiff to establish, in view of the facts so found, that the car was being operated at the time as a family car. From this it would follow that if the plaintiff offered no evidence upon the issue and the trier disbelieved the testimony offered by the defendant for the purpose of showing the circumstances of operation to have been such that it was not a family car, the plaintiff would be entitled to recovery.''

What then was the legislative intent as to how the findings and order should be regarded by the trier of the facts? We are not here dealing with a mere common law presumption, nor are we dealing with a statute which uses the term presumption at all. We are dealing with something which the statute makes evidence. Prima facie, it is true, but still evidence. Not only does the statute make it evidence, but it does so only after such evidence has been arrived at after a hearing before a body acting in a judicial capacity, subject to review by the Superior and Supreme Courts of the State of Washington acting in judicial capacity for the purpose of determining whether the evidence before the Department warranted the making of findings and warranted the making of the order which rests upon such findings.

Is it to be seriously argued that prima facie evidence, under such circumstances, was intended by the legislature to have no greater force and effect than would be given to an ordinary common law presumption of law which arises not after a hearing and not after judicial review, but arises solely from human experience and inherent probability. Certainly no case cited by appellant requires such an interpretation.

But appellant claims that if the findings are permitted to be weighed as against contrary evidence, there would be a denial of due process, citing no authority to that effect. But in view of the fact that the carrier is permitted to attack the findings and order by introducing rebutting evidence so as to present its own version of the facts, which facts must be considered in the light of the trial court's instructions on the law, there would seem to be no basis for such a contention. Similar reasoning has resulted in a rejection of a similar contention as to the similar provision under the I.C.C. *Meeker v. Lehigh Valley Railroad Co.,* 236 U. S. 412, 35 S. C. R. 328, 59 L. Ed. 644. So long as the findings and order are given the effect of prima facie evidence of the facts stated, and so long as such effect cannot be claimed until after the findngs have been made after hearing and subject to judicial review, it can scarcely be claimed that

to permit such evidence to be weighed is so arbitrary as to constitute a denial of due process. There is nothing arbitrary about findings so carefully hedged about.

But appellant then claims that under section 635 of the judicial code, which reads:

> "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

that the findings and order cannot be weighed as evidence. (App. br. 281). In the first place, that section deals only with the question of "mode of proof," that is, the procedure of taking testimony. It does not purport to deal with the question of the effect to be given to testimony properly admitted. This is especially evident from the fact that the cases cited by appellant construing the statute deal with the examination of a party before trial, interrogatories, and the production of books and writings before trial. (App. br. 281). Furthermore, the subsequent sections of the judicial code following with exceptions, deal with matters such as depositions and the like.

Indeed, if appellant's argument were sound, the findings and order of the Department would be inad-

missible even as prima facie evidence, since such findings are neither "oral testimony" nor the result of the "examination of witnesses in open court". The error of appellant's argument is easily exposed by reason of the fact that it proves too much.

2. Error, if any, not prejudicial. Appellant's claim of error is predicated on the proposition that the court's instruction means that the findings and order may be weighed as evidence in face of countervailing evidence. This conclusion is said to result from the following instruction:

> "Prima facie evidence is evidence which standing alone and unexplained would maintain the proposition and warrant the conclusions to support which it is introduced. Such evidence once in a case stands there all through the trial unless stricken out by the court, and should be given such weight and only such weight as the jury thinks it is entitled to in connection with all the other evidence in the case."

While it is true that this instruction may possibly mean that the findings and order may be weighed, that is not a inevitable conclusion. The instruction may mean that until the prima facie evidence is rebutted by credible testimony, it stands. Hence the presumption as to the facts found continues all through the trial until facts or parts of facts are rebutted. In that sense, the presumption is given

weight if there is no countervailing evidence and the presumption is also given weight if the countervailing evidence is not credible. This interpretation is undoubtedly what the court meant, for it later stated:

> "Prima facie evidence may, *if believed by the jury,* properly justify, although it does not compel, the conclusion in support of which it is offered. . . "
>
> "Such facts in evidence may be considered by the jury as successfully overcome and rebutted if, and only if, the jury believes from other credible evidence in the case that such facts and evidence are not consistent with the truth, or should be given less weight than such other credible evidence."

The trial court adopted appellant's view that countervailing evidence must be credible. (App. br. 317). It must necessarily follow that if the evidence must be credible and if the jury are the judges of the credibility of the evidence, that until the jury determines whether the rebutting evidence is credible, the findings must stand throughout the case and must prevail, and to that extent given weight if the countervailing evidence is found not credible.

This interpretation of the courts instructions is not only a possible one, but an entirely permissible one. The plaintiff not only relied upon the findings and order, but offered testimony on all phases of the

case as to shipment, freight charges, breakage, the Long-Woodworth agreement, and all the other matters referred to in the findings. In other words, it proved its case independently of the findings for the purpose of rebutting the case made by the defendant.

Furthermore, there were matters in the findings which were not met by the defendant's evidence at all, and certainly those portions of the findings would clearly stay throughout the case.

In *McMullen v. Warren Motor Co.,* 174 Wash. 454, (cited App. br. 280), and decided before *Karp v. Herder,* 81 Wash. Dec. 511, supra, the court instructed the jury in consolidated actions for personal injuries resulting from an automobile collision:

> "You may take into consideration this admission (ownership of automobile), and the resulting presumption, together with all of the other facts and circumstances of the case, in determining whether or not, at the time and place of the collision, the said Dewey Rochester was engaged, in whole or in part, in the business of the Warren Motor Company.'

The Court said:

> "The instruction concluded with the statement that the presumption referred to was rebuttable, but the question as to whether Rochester was, at the time and place of the accident, engaged in the business of the appellant, was one for the jury's determination. . . "

"The instruction is technically erroneous, in that the jury could infer therefrom that the presumption could be treated as evidence, together with all the other facts and circumstances in the case, while the rule of law is, as above pointed out, that the presumption is not evidence. The presumption, however, was still in the case because it had not been met by disinterested witnesses, and it should have been called to the jury's attention, not as evidence, but as a mere presumption or conclusion. Since the presumption would have been sufficient to take the case to the jury without other evidence on the part of the respondents, it does not appear to us that the instruction, while erroneous in the respect pointed out, was prejudicial. It only told the jury that they coud take into consideration the presumption, together with all the other facts and circumstances, and only by inference could it be said that the presumption was called to the jurys attention as evidence."

So here. In light of the fact that evidence was introduced by both sides for the purpose of proving and rebutting a cause of action sufficient to take the case to the jury on the issues of fact so made, and in view of the fact that the jury's attention was called to the presumption and its right to weigh the presumption as evidence only by inference, the error, if it be error, is not prejudicial.

ANSWER TO No. 54

(Tr. 316-317, 326, 472; App. br. 256, 295, 311)

Appellant contends the court erred in instructing the jury generally as to the fact that the findings and order of the department were prima facie evidence of the facts therein stated, and not of the liability, comments, statements or opinions of the law. Appellant contends the court should have deleted and segregated and pointed out what were findings of fact. This contention has already been considered and negatived. (See br. 22, 60).

ANSWER TO No. 55

(Tr. 318, 327, 473; App. br. 125)

Appellant contends that the court erred in instructing the jury that the term board measure in tariff 51 was ambiguous. Appellant contends that the term board measure was unambiguous as a matter of law. For answer see brief 19.

ANSWER TO No. 56

(Tr. 318-319, 327, 474; App. br. 334, 344)

Appellant contends the court erred in instructing the jury that the proper method of scaling logs under tariff 51 is that method which the jury finds accepted

and applied commercially in the logging industry. Appellant contends that this instruction improperly excluded from the jury's consideration every other rule of interpreting ambiguous tariffs. It is also claimed that this instruction was contradictory, with an earlier instruction to the effect that it was for the jury to determine what was the proper method of scaling the logs to ascertain the correct board measure. (App. br. 344).

There is no necessary contradiction in telling the jury that ambiguities must be interpreted in the commercial sense, and also telling the jury that it is for it to decide which of the competing methods of scaling was the one accepted commercially. That that is all that the court meant is shown by a later instruction reading:

> "If you find a preponderance of the evidence that the defendant's method of scaling was the commercial method used generally in the logging industry and that by such method no overcharges resulted, then your verdict shall be for the defendant.
>
> "But if you find from a preponderance of the evidence that the plaintiff's method of scaling was the commercial method used generally in the logging industry and that by applying that method overcharges were suffered by plaintiff in the freight charges exacted by defendant, then your verdict should be for the plaintiff." (Tr. 319).

That it was proper for the court to instruct the jury that ambiguities should be interpreted in the comercial sense is clear from what has heretofore been said. The interpretation of tariff 51 as appellant itself contends is a question of law for the court. (App. br. 122). What that law is has been determined by the Supreme Court of Washington acting judicially and declaring the law of the State by which to test the reasonableness and lawfulness of the findings and order. (See br. 17, 19, 60). That law is binding on the Federal Court, hence it is proper to instruct the jury in accordance with that law. It is not for the jury to determine the question as to what that law is. It is, therefore, entirely proper for the court to instruct the jury as to the law to be applied in construing the ambiguity in accordance with the law of the State of Washington.

ANSWER TO No. 57

(Tr. 319-320, 327-328, 475; App. br. 125, 335)

Appellant contends that the court erred in instructing the jury that in determining the meaning of board measure it might consider the construction made by the Department of Public Works along with other evidence in the case. It is argued that this was im-

proper because the tariff was not ambiguous as a matter of law. For answer, see brief page 19.

It is also argued that the decision of the Department as to the interpretation of the tariff is without any force whatsoever (App. br. 335), but the authorities cited for this proposition arise under the I. C. C. and merely hold nothing more than that the construction of a tariff by the I. C. C. is not binding on the court. They do not hold that it is without any force whatsoever. Futhermore, the law of Washington, as stated in *Northern Pacific Railway Co. v. Sauk River Lumber Company,* 160 Wash. 691, 693:

> "The tariff under which the logs moved not defining board measure, when the question was presented it became primarily a question for the Department of Public Works to determine."

If the Department, acting under the authority given it by statute to construe doubtful tariffs makes a construction, it would seem entirely proper that construction should be considered along with other evidence in determining whether the construction was correct. That is all that the assailed instruction attempts to do.

In any event, the departmental construction being in accordance with the law of the State of Washington as announced in the *Northern Pacific Railway Co.*

v. Sauk River Lumber Co., case, supra, no error resulted. (See br. p. 160).

ANSWER TO No. 58

(Tr. 320, 328-329, 476; App. br. 344, 345)

Appellant contends that the court erred in instructing the jury that if they found the method accepted comercially resulted in the carriage of some logs without compensation, that fact would make no difference. It is contended that this instruction violated the principle that free carriage is illegal. But as heretofore pointed out, that principle is inoperative in collateral attack. It must be conclusively presumed that the free carriage in form is not really free in fact. (See br. p. 25).

ANSWER TO No. 59

(Tr. 321, 328-329, 477; App. br. 344)

Appellant contends the court erred in instructing the jury that if the proper application of the scale commercially used showed overcharge, the plaintiff could recover. It is argued that this gives an interpretation of board measure which would exclude compensation for cull logs. The answer is the same as that made to assignments 56 and 58. See brief page 175.

ANSWER TO No. 60

(Tr. 341, 477; App. br. 125, 137, 146, 159, 172, 181, 192, 212, 247)

Appellant contends the court erred in refusing to instruct a verdict for the defendant. This argument is based on the same matters argued under assignment of error 23, and the answering argument made thereto need not here be repeated. See brief page 77.

ANSWER TO No. 61

(Tr. 329, 341, 478; App. br. 247, 256);

No. 62

(Tr. 330, 341, 478; App. br. 256, 283);

No. 63

(Tr. 330, 341, 479; App. br. 256, 284);

No. 64

(Tr. 331, 341, 480; App. br. 256, 284);

No. 65

(Tr. 332, 341, 481; App. br. 256, 284);

No. 66

(Tr. 333, 341, 482; App. br. 256, 285);

No. 67

(Tr. 333, 341, 483; App. br. 256, 287);

No. 68

(Tr. 334, 341, 485; App. br. 258, 287);

No. 69

(Tr. 335, 341, 486; App. br. 256);

No. 70

(Tr. 336, 341, 487; App. br. 256, 288);

No. 71

(Tr. 336, 341, 487; App. br. 256, 289);

No. 72

(Tr. 337, 341, 488; App. br. 256, 290);

No. 73

(Tr. 337, 341, 489; App. br. 256, 290);

No. 74

(Tr. 338, 341, 490; App. br. 256, 291);

No. 75

(Tr. 338, 341, 490; App. br. 256, 291);

No. 76

(Tr. 339, 341, 491; App. br. 256, 292);

No. 77

(Tr. 339, 341, 491; App. br. 256, 292);

No. 78

(Tr. 339, 341, 492; App. br. 256, 293).

Appellant contends that the court erred in refusing

to instruct the jury to disregard the whole of the findings and order and alternatively to disregard specific parts thereof. This contention is the same as that raised by assignments 4 to 22, inclusive, to which answer has heretofore been made and need not here be repeated. (See brief page 60).

ANSWER TO No. 79

(Tr. 341-342, 344, 494; App. br. 256, 316);

No. 80

(Tr. 343, 344, 495; App. br. 256, 316).

Appellant contends the court erred in refusing to instruct the jury that the findings of the Department cannot be "weighed and considered" in opposition to the testimony of witnesses in open court. This assignment raises the same questons as that considered under assignment 53, and the answer thereto need not here be repeated. See brief page 162.

Furthermore, the instruction does not sufficiently refer to the fact that the countervailing evidence, particularly countervailing documentary evidence, must be credible.

ANSWER TO No. 81

(Tr. 343, 344, 496; App. br. 256, 323)

Appellant contends the court erred in refusing to instruct the jury that there is no presumpton of

liability by reason of the entry of the Departmental order awarding reparation. The requested instruction was given in substance, when the court instructed on the effect that the findings and order should have as prima facie evidence of the facts stated, and specifically stated also that it was not prima facie evidence of "the liability of the defendant". (Tr. 317).

The court also instructed that the jury must take the law as given by the court and determine the case upon the evidence before it. Tr. 317, 318). There is, of course, no duty on the part of the court to instruct in the proposed language of one party or the other. It may instruct in its own language. See *Stanhope v. Strang,* 140 Wash. 693.

ANSWER TO No. 82

(Tr. 344-345, 497; App. br. 256, 323)

Appellant contends the court erred in refusing to instruct that the findings of fact of the Department are not prima facie evidence of liability. This assignment raises substantially the same question as assignment 81, and for answer see the answer thereto. (See brief page 182).

ANSWER TO No. 83

(Tr. 345-346, 497; App. br. 256, 325)

Appellant contends the court erred in refusing to instruct the jury that the order of reparation is not evidence of any fact in this case, or of liability. This assignment raises the same question as assignment 81, and is answered in the same way. (See brief p. 182).

The last sentence of the proposed instruction is also misleading. It reads:

> "You will not consider said order of the Department of Public Works for any purpose whatever in deciding on your verdict in this case."

This, in effect, was a direction to disregard evidence properly admitted under the statute. (R. R. S. 10350). This was clearly an improper sentence to include in its proposed instruction.

ANSWER TO No. 84

(Tr. 346, 498; App. br. 256, 325)

Appellant contends the court erred in refusing to instruct the jury that the force of the findings of fact entered by the Department were not enhanced by proceedings through the State courts. This was an unnecessary instruction, because the effect to be given to the findngs and order were clearly pointed out by

the trial court. Furthermore, the instruction was untrue in that the effect of an affirmance by the Supreme Court of the findings and order is a judicial holding that the findings and order are reasonable and lawful, thereby carrying greater weight than if they were not, even though it be true that the findings and order with or without an appeal are still prima facie evidence of the facts therein stated. But to state that the validity of the findings of fact was not enhanced or increased as requested, is not correct. Findings judicially declared to be valid are certainly worth more than findings upon which no such judicial declaration has been made.

Furthermore, there was included in the proposed instruction the statement,—

> " . . . It is your duty to determine what the *true* facts are and apply the law to those facts." (Italics ours).

This portion was misleading, in that it suggested that the findings were untrue.

ANSWER TO No. 85

(Tr. 346-347, 499; App. br. 326)

Appellant contends that the court erred in refusing to instruct the jury that the decision of the Supreme Court was not before it and that in arriving at its

verdict it should "not consider at all the decision of the Supreme Court of Washington."

As heretofore pointed out, while the wording of the decision was not in evidence nor read to the jury, the action of the Supreme Court, in reversing the action of the Superior Court and reinstating the findings and the award of the Department, was a fact in evidence. If the jury were not to consider the decision of the Supreme Court in reinstating the findings and order, plaintiff would have been in a position of suing upon findings and order set aside by the Superior Court as being invalid. Why the jury should be instructed to disregard evidence in the case in that manner is not explained by appellant. How the Supreme Court's decision was in the case has heretofore been pointed out. (See brief page 153).

ANSWER TO No. 86

(Tr. 347, 348, 499; App. br. 351)

Appellant contends the court erred in refusing to instruct the jury that neither party to the proceeding was under any duty to offer all of its available evidence at the hearing before the Department, and could choose instead to present its defense for the first time on a trial to a court and jury. But the court had let in all the proper evidence offered by the defendant

to rebut the findings, and the appellant had shown that there were additional witnesses at the trial that were not before the Department. Furthermore, the court also instructed the jury (Tr. 318):

> "In considering the findings of the Department, you have a right to consider the fact, if it be a fact, that new or additional evidence has been introduced before you which was not before the Department."

This clearly implied the right expressly stated in the proposed instruction, and was sufficient.

ANSWER TO No. 87

(Tr. 348-349, 500; App. br. 146, 337)

Appellant contends that the court erred in refusing to instruct the jury that ambiguous terms in a tariff should be interpreted by practical construction of the parties. This raises the same question as that heretofore considered, and the answer heretofore made is referred to. (See br. p. 19). Clearly the practical construction so called of one party to the joint tariff would not be sufficient even if it were otherwise proper.

ANSWER TO No. 88

(Tr. 348, 350, 502; App. br. 146, 338)

Appellant contends the court erred in refusing to instruct the jury that an ambiguous term is to be

construed in accordance with the practical construction of the parties. The answer to this assignment is the same as the answer to assignment 87, and reference is made thereto. (See brief page 187).

ANSWER TO No. 89

(Tr. 348, 350, 503; App. br. 137, 339)

Appellant contends the court erred in refusing to instruct the jury that an ambiguity should be construed reasonably. For answer see brief page 19.

Furthermore, the proposed instruction was erroneous in that the question of whether ambiguity exists was left to the jury. (See br. p. 177).

ANSWER TO No. 90

(Tr. 348, 350, 503; App. br. 137, 339)

Appellant contends the court erred in refusing to instruct the jury that in construing a tariff all its terms and provisions must be considered together. For answer, see brief page 19.

Furthermore, the instruction is erroneous in that it leaves the existence of ambiguity to the jury.

ANSWER TO No. 91

(Tr. 348, 351-352, 504; App. br. 159, 340)

Appellant contends the court erred in refusing to

instruct the jury that an ambiguity must be construed so as to render the tariff legal. For answer see brief p. 20. The instruction is further erroneous in that it leaves the question of whether ambiguity exists to be determined by the jury.

ANSWER TO No. 92

(Tr. 348, 352, 353, 506; App. br. 212, 253, 341)

Appellant contends the court erred in refusing to instruct the jury concerning the resolving of ambiguities against the party preparing the instrument. For answer see brief 23, 17. The instruction was further erroneous in that it included the following:

> "You are further instructed that this rule does not apply in any case where the document represents the joint effort of both parties or where both parties are equally responsible for its wording."

There is no evidence that tariff 51 was prepared by the plaintiff or by the shippers. The carriers themselves chose the form that the tariff should take in compliance with what they believed the Long-Woodworth agreement meant. There was, therefore, no evidence for that portion of the instruction to rest upon.

ANSWER TO No. 93

(Tr. 348, 353, 506; App. br. 212, 253, 341)

Appellant contends the court erred in refusing to instruct the jury that the ambiguity in tariff 51 should be resolved against the shipper. For answer see assignment 92.

ANSWER TO No. 94

(Tr. 353-354, 507; App. br. 212, 253, 256, 318, 342)

Appellant contends the court erred in refusing to instruct the jury that the construction of board measure by the Department was improper and inapplicable, it having applied the wrong rule under the facts of this case. However, the rule followed by the Department was approved by the Supreme Court of Washington, and the law by which the Departmental conclusion was tested required the commercial interpretation to be made. To have instructed the jury as contended for by appellant would have been to instruct the jury contrary to the law of the State of Washington. The requested instruction was clearly improper. (See brief pages 17, 19, 23).

ANSWER TO No. 95

(Tr. 355, 509; App. br. 125, 256, 318)

Appellant contends that the court erred in refusing to instruct the jury that the term board measure is

not ambiguous and the Department was wrong in treating board measure as ambiguous. For answer see brief pages 19 and 78.

ANSWER TO No. 96

(Tr. 356, 510; App. br. 192)

Appellant contends the court erred in refusing to instruct the jury that it was not necessary for the defendant's scaling rules to be filed with the Department of Public Works, and that the unpublished scaling rules observed by the defendant are binding on the parties. For answer, see brief pages 19, 21, 22.

ANSWER TO No. 97

(Tr. 356-357, 510; App. br. 192)

Appellant contends that the court erred in refusing to instruct the jury that the appellant's unpublished scaling rules were binding. For answer, see 21, 22.

ANSWER TO No. 98

(Tr. 357, 511; App. br. 346)

Appellant contends that the court erred in refusing to instruct the jury that the shippers' protest of the use of the Northern Pacific scaling method from time to time was immaterial except as bearing on the question of the shippers' knowledge of railroad scaling practices; but clearly protest would be evidence

of the shipper's understanding of the term board measure which this instruction entirely overlooks. Furthermore, it is improper since it attempts to raise the issue of estoppel, for answer to which, see brief 100, 102.

ANSWER TO No. 99

(Tr. 357-358, 512; App. br. 256, 318);

No. 100

(Tr. 358-359, 513; App. br. 256, 318);

No. 101

(Tr. 359-360, 514; App. br. 256, 318);

No. 102

(Tr. 359, 360-361, 515; App. br. 256, 318);

No. 103

(Tr. 359, 361-362, 516; App. br. 256, 318);

No. 104

(Tr. 362-363, 517; App. br. 256, 318);

No. 105

(Tr. 363-364, 518; App. br. 256, 318).

Appellant contends the court erred in refusing to specifically instruct the jury on specific findings, instructing the jury which findings to disregard. They raise but one question, namely, the duty of the court to specifically pick out, delete and instruct on specific

findings, which duty has heretofore been considered and negatived. See answer to assignment 23.

Futhermore, the various matters covered in the proposed instructions which are the subject matter of the foregoing assignments deal with evidence from which the Department concludes that board measure means board measure according to the commercial method. Since that is the law of the State of Washington, no prejudice could result to the appellant by the court's refusal to specifically refer to each of the findings, point out their alleged inaccuracies, when the rule ultimately to be applied would be the same whether those findings were accurate or not, namely, that board measure should be construed in its commercial sense.

ANSWER TO No. 106

(Tr. 363, 364-365, 519; App. br. 176)

Appellant contends the court erred in refusing to instruct the jury that they should deduct from the amount claimed such loss in scale due to breakage as they should find took place.

But there was no error in refusing this requested instruction, for the court instructed the jury, (Tr. 320):

"If from a preponderance of the evidence you

find that there was breakage of logs resulting in loss of scale and loss of logs by breakage, sinking or otherwise, deduction for which is not permissible under such proper commercial scale, your verdict must be for the defendant unless the plaintiff establishes by a fair preponderance of the evidence that the amount thereof was less than the amount of the alleged overscale."

(Tr. 321) "The same is true of errors or incompetence in scaling. If the claimed overcharge is found by you from the evidence to be caused in whole or in part by errors or incompetence of scalers, so much of the alleged overcharge, if any, as was due to such errors or incompetence, if any, must be deducted from the amount, if any, of such overcharge."

ANSWER TO No. 107

(Tr. 365, 520; App. br. 176)

Appellant contends that the court erred in refusing to instruct the jury that if breakage of logs resulted in loss of scale and loss of logs by sinking or otherwise, its verdict must be for the defendant unless plaintiff proved that the amount of the overcharge was less than alleged overscale. This instruction was given substantially in that form by the court. (Tr. 320, br. 193).

ANSWER TO No. 108

(Tr. 365-366, 521; App. br. 172)

Appellant contends the court erred in refusing to instruct the jury that if plaintiff knowingly delayed

proceedings to collect its claims for over a year, it was estopped to recover. For answer see brief 100, 102.

It should be pointed out in passing that this alleged defense was not pleaded.

ANSWER TO No. 109

(Tr. 366-367, 522; App. br. 346, 349)

Appellant contends the court erred in refusing to instruct the jury that appellant was entitled to collect freight for culls. To have so instructed, however, would have been inconsistent with the instruction on the commercial method, and it was therefore properly rejected. (See brief 175, 187 to 191).

ANSWER TO No. 110

(Tr. 367-368, 522; App. br. 346)

Appellant contends the court erred in refusing to instruct the jury among other things that:

> "If you believe from the evidence that the difference between the railway sale and bureau scale of only 5.2% is no greater than permitted by the bureau scale as a margin of error in its own scale, then the verdict must be for defendants."

There was clearly no evidence to warrant any such instruction. The mere fact that commercial scalers might differ in their estimates by 5% did not mean that the scale as actually made on behalf of appellee

is incorrect to the extent of 5%. However close two scalers might come in scaling the same raft of logs is no evidence that the scale actually made is incorrect. This proposed instruction was viciously misleading.

Furthermore, the evidence was also to the effect that there was no such rule as the 5% tolerance rule. Mr. Stuchell, President of the Eclipse Mill, testified (Tr. 246):

"I do not know what the rule of tolerance is."

Mr. Hayes, who scaled 95% of the logs in suit, testified (Tr. 249):

"I never heard of the 5% tolerance rule."

Therefore, insofar as the same requested instruction stated "that it is recognized by the rules of the scaling bureau that competent commercial scalers will differ in their estimates by 5%," the instruction would have been in contradiction to some of the testimony in the case.

Furthermore, the court instructed the jury:

> "If you find, from a preponderance of the evidence, that the overcharges, or any part thereof, claimed by plaintiff, were justified or made permissible by reason of an applicable general rule of tolerance or forgiveness based on average errors in scaling, then so much of plaintiff's claim

as was so justified or permissible should be deducted from such overcharges, if any."

This, in substance, gave the requested instruction of appellant, and was far more favorable to appellant than it was entitled to receive.

ANSWER TO No. 111

(Tr. 367, 368, 524; App. br. 346)

Appellant contends the court erred in refusing to instruct the jury that if they found that Hayes was an erratic scaler and that his scaling was unreliable, the jury's verdict must be for the defendant. The same requested instruction included a statement to the effect that the difference between the railway and Bureau scale was 5.2% and that Hayes scaled approximately 95% of the plaintiff's logs. The instruction was clearly improper not only because there was no particular relationship between the difference in the Bureau and the railway scale of 5% and the fact that Hayes scaled approximately 95% of the plaintiff's logs, but also because it called for a verdict that the plaintiff was entitled to nothing even for the remaining 5% of the logs which Mr. Hayes did not scale, and would take from the jury its right to determine whether the scaling actually made of the Sauk logs

was substantially correct, even though ordinarily Hayes was an erratic scaler.

There was testmony also that Hayes was erratic by scaling too high. (Tr. 119, 246). How then, could this, if believed, justify a verdict for the defendant, since the higher the scale the more freight was paid to the defendant. If the shipper sued for less than that to which it was entitled, this could not justify a verdict for the defendant.

Furthermore, the jury were adequately instructed on the question of errors and incompetence in scaling, and the effect thereon in deducting from the amount all the claimed overcharge. (Tr. 321).

ANSWER TO No. 112

(Tr. 368-369, 524; App. br. 172)

Appellant contends the court erred in refusing to instruct the jury that it was the shipper's duty to object promptly on learning that the appellant was not following the commercial method of scaling and upon the jury's finding that it failed so to do, its verdict must be for the defendant. For answer, see assignment 108. Furthermore, there is no evidence upon which this instruction could be based, namely that the Sauk River Lumber Company knew prior to

1927, that the Northern Pacific was not following the commercial method. Furthermore, this instruction. even if otherwise proper, fails to limit the recovery of the shipper to overcharge made prior to knowledge of the fact that the Northern Pacific was not following the commercial method. A verdict for the defendant under such state of facts would mean that even if the Sauk River Company had no knowledge whatsoever for six months of the Northern Pacific method of scaling, and that thereafter acquired knowledge and failed to object for another six months, that it could recover nothing even for the first six months.

ANSWER TO No. 113

(Tr. 369-370, 525; App. br. 172)

Appellant contends that the court erred in refusing to instruct the jury that if plaintiff knew on or before January 1, 1926, that the defendant did not apply the commercial method and failed to object until after the year had elapsed, the jury's verdict should be for the defendant. For answer, see assignment 112. This so-called defense was not pleaded. Furthermore, it is not a defense. It is for the carrier to charge the proper scale, and it is as much charged with knowledge of the law as is the shipper. Under such circumstances there can be no estoppel. (See brief 20).

ANSWER TO No. 114

(Tr. 370-371, 526; App. br. 318)

Plaintiff contends that the court erred in refusing to instruct the jury to disregard all evidence and argument of plaintiff's counsel as to the difficulty of correctly scaling logs on cars, and as to the inexperience of railroad scalers and all evidence or argument that the railway scale was incorrect under its own scaling rule.

Such an instruction would have clearly disregarded the findings on the question, which were prima facie evidence unless the jury believed credible countervailing evidence, and was a matter of detail which the court could properly refuse to give. In any event, the court, in its own instructions, dealt fully with the question of placing upon the plaintiff the burden of showing the amount of the overcharge. The instruction disregarded the value of such testimony as bearing on the accuracy of the Bureau scale which was made in the water. The evidence clearly showed that that amount was based upon the difference between the railway footage and the shipper's footage based upon the commercial scale. There was, therefore, no need for this instruction, which was, after all, also misleading.

ANSWER TO No. 115

(Tr. 371-372, 527; App. br. 212)

Appellant contends that the court erred in refusing to instruct the jury that if the appellant scaled plaintiff's logs prior to October 1, 1925, by its own scaling rule, and continued to so scale after tariff 51 took effect, that the jury's verdict must be for the defendant. It is argued in support of this instruction that the Long-Woodworth agreement is a bar to this claim. For answer, see brief 114. It should be pointed out in passing that appellant by this instruction is seeking to treat tariff 51, a joint tariff, as though it were a severable tariff with one construction applicable for the Northern Pacific and another for the other carriers. Furthermore, the error claimed is unavailing for the reason that there was no exception saved to the action of the trial court in not submitting to the jury the question of estoppel by Long-Woodworth agreement in its instrution upon the pleadings. If the error on an issue not submitted to the jury is not available, it would seem not available if an instruction under such unavailable issue is requested, even though an exception be saved to the refusal to give the instruction.

ANSWER TO No. 116

(Tr. 372-373, 528; App. br. 192)

Appellant contends the court erred in refusing to instruct the jury that the Northern Pacific's unpublished scaling rules, unpublished in reliance upon the the Department's administrative construction, is binding, and that the jury's verdict must be for the defendant. For answer, see brief 22.

In passing, it should be pointed out that this instruction in effect told the jury that even though board measure meant commercial scale, the Northern Pacific's unpublished scaling rules were binding.

ANSWER TO No. 117

(Tr. 373-374, 529; App. br. 172)

Appellant contends that the court erred in refusing to instruct the jury that the plaintiff could not recover unless the jury found that the plaintiff was not misled by the ambiguity in tariff 51. It is argued that the plaintiff would be estopped to recover. This proposed instruction was but another form of the instruction which is the basis of assignments of error 112 and 113, and the answer there made is here applicable. It should be pointed out that there was no evidence of shipment with such knowledge, and no pleading to warrant that instruction.

CONCLUSION

While we regret the length of this brief, we have had no choice but to answer each of the arguments and discuss each of the assignments of error claimed to exist by appellant. Having carefully examined each of the contentions and all the authorities cited in appellant's brief, we are convinced that appellant's suggestion that the record in this case is "an inexhaustible mine of error" is wholly without foundation, and exists solely because of appellant's views as to the law applicable in this case. It is respectfully submitted that none of the appellant's assignments of error are well taken.

Respectfully submitted,
HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
FRANK M. PRESTON,
CHARLES HOROWITZ,

Attorneys for Appellee and Cross-Appellant.